

NORTH CAROLINA COURT OF APPEALS REPORTS

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CASES
ARGUED AND DETERMINED IN THE
COURT OF APPEALS
OF
NORTH CAROLINA
AT
RALEIGH

IN THE MATTER OF: N.G.

No. COA07-369

(Filed 18 September 2007)

1. Child Abuse and Neglect— neglect of third child—injuries to first child—responsibility of parents—collateral estoppel

Respondent parents in a child neglect case involving their third child were collaterally estopped from denying responsibility for “shaken baby syndrome” injuries suffered by their first child where, in an order terminating their parental rights to the first child, the trial court found that the first child “was an abused child in that she suffered physical injuries by other than accidental means while in the care of her parents.”

2. Child Abuse and Neglect— child neglect—findings of fact—supporting evidence

The evidence in a child neglect case supported findings by the trial court that respondent parents failed to cooperate with DSS and failed to make reasonable progress on improving their parenting skills; respondents had not engaged in treatment services and continued to deny responsibility for injuries suffered by another child after their parental rights to that child were terminated for causing nonaccidental injuries to the child; respondents failed to participate in the Family PRIDE Program as directed by court order; respondents refused to schedule home visits by DSS even though the DSS social worker offered to come

after regular hours; and respondents were consistently late to visitations with the child.

3. Child Abuse and Neglect— neglected child—failure to order kinship placement

The trial court did not err by declining a kinship placement for a neglected child where DSS completed kinship assessments with all relatives suggested by respondent parents, and family placement was inappropriate because the family members did not believe that the child was in need of protection and it would therefore not ensure the child's safety.

4. Child Abuse and Neglect— child neglect—risk of future abuse or neglect—injuries to another child—other factors

The trial court did not err by adjudicating respondents' third child to be a neglected juvenile based on the high risk of future abuse or neglect where, in addition to the fact that respondents' parental rights to their first child had been terminated on the ground that respondents were responsible for "shaken baby" and other nonaccidental injuries suffered by that child, the trial court also considered respondents' failure to participate in the PRIDE program, respondents' attempts to hide the fact of the mother's pregnancy, respondents' failure to inform DSS of a change of address, respondents' continued refusal to accept responsibility for the first child's injuries, respondents' failure to participate in anger management classes, respondents' consistent tardiness to visits, respondents' attempts to discourage home visits from DSS, and evidence of recidivism rates.

5. Child Abuse and Neglect— neglected child—ceasing of reunification efforts and visitation

The trial court in a child neglect case involving respondents' third child did not abuse its discretion by concluding that reunification efforts would be futile and that reunification efforts and visitation should cease where the evidence supported a finding by the court that DSS had been involved with respondents for several years when their first child was placed into protective custody; respondents failed to cooperate with the various social workers, failed to comply with family service plans, and did not make reasonable efforts at reunification with their first child; respondents concealed the birth of their third child from DSS; respondents have not recognized their responsibility for nonaccidental injuries to their first child; and respondents have failed

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to cooperate with DSS and comply with their case plan for obtaining parental education, supervision, instruction and behavioral counseling.

Judge TYSON dissenting.

Appeal by respondents from order entered 30 January 2007 by Judge Albert A. Corbett, Jr., in Harnett County District Court. Heard in the Court of Appeals 30 July 2007.

E. Marshall Woodall and Duncan B. McCormick, for petitioner-appellee Harnett County Department of Social Services.

Sofie W. Hosford, for respondent-appellant mother.

Lisa Skinner Lefler, for respondent-appellant father.

Elizabeth Myrick Boone, for guardian ad litem.

ELMORE, Judge.

On 24 October 2005, the Harnett County Department of Social Services (DSS) filed a juvenile petition alleging that N.G. was a neglected child. DSS claimed that N.G. was not receiving proper medical care due to respondents' desire to conceal the child's existence from DSS. DSS alleged that respondents concealed the pregnancy and birth of the child due to the family's history with the agency. Specifically, DSS noted that respondents' parental rights had been terminated with respect to their first child, and that their second child was in DSS custody. DSS further stated that respondents' first child, L.G., sustained injuries associated with "shaken baby syndrome" and that the injuries were deemed non-accidental. Respondents' second child was removed based on the assessment that the home environment being assessed as injurious to the child's welfare. DSS alleged that N.G. also lived in an environment injurious to her welfare due to the significance of L.G.'s injuries, respondents' lack of cooperation with DSS, and their inability to take responsibility or explain L.G.'s injuries. A non-secure custody order was entered and N.G. was removed from respondents' home.

An adjudicatory and dispositional hearing was held on 20 September 2006. On 30 January 2007, the trial court entered the written adjudicatory and disposition order. The trial court found that N.G. was a neglected juvenile in that she lived in an environment injurious to her welfare. The trial court awarded custody to DSS, con-

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cluded that reunification would be futile, and ceased visitation. Respondents appeal.

I.

Respondents first argue that adjudicatory findings of fact numbers 5, 7, 9, 10, 12, 18, 24, 25, and 27, as well as dispositional findings of fact numbers 5, 6, 7, 8, and 9, are contrary to the evidence presented. Respondents further challenge the trial court's adjudicatory conclusions of law.

"Allegations of neglect must be proven by clear and convincing evidence. In a non-jury neglect adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings." *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997) (citations omitted).

[1] In findings of fact numbers 5 and 7, the trial court found that N.G. lived in an environment injurious to her welfare because she was allowed to live in a home where an older sibling had been subjected to abuse and respondents had not adequately addressed the conditions that led to the abusive acts. Further, the trial court found that L.G. suffered physical injuries by other than accidental means while in respondents' care. The court then listed L.G.'s many injuries, including intracranial injuries, skull fractures, fractured ribs, and fractured tibias. In finding of fact number 9, the trial court found:

The rib injuries . . . were consistent with being caused by direct impact or from forceful squeezing or compression of her ribs. The injuries to her tibias were likely caused by forceful twisting or torques of those bones. The head injuries were caused by [L.G.] being shaken violently and/or from a forceful impact to her head.

Respondents contend that petitioner failed to present clear, cogent, and convincing evidence that either respondent caused the injuries. However, in the order terminating respondents' parental rights to L.G., the trial court made almost identical findings, and found that L.G. was "an abused child in that she suffered physical injuries by other than accidental means while in the care of her parents." "The doctrine of collateral estoppel operates to preclude parties 'from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination.'" *In re Wheeler*, 87 N.C. App. 189, 194, 360 S.E.2d 458, 461 (1987) (quoting *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E.2d 799, 805 (1973)).

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Therefore, respondents are estopped from denying responsibility for L.G.'s injuries.

[2] Respondents next challenge findings made by the trial court relating to their cooperation with DSS and completion of their case plan. In finding of fact number 12, the trial court found that respondents failed to cooperate with DSS and made no progress on taking steps to improve their parenting skills. In findings of fact numbers 23 and 24, the trial court found that respondents "failed to make reasonable progress on improving their parenting skills and abilities" and had "not engaged in treatment services as ordered by the court and have continued to deny any responsibility for the injuries involving the older sibling . . . or acknowledge any wrongdoings involving that child." In dispositional finding of fact number 6, the trial court found that respondents had failed to cooperate with the various social workers and failed to fully cooperate with family service plans, and that respondents had failed to take responsibility for L.G.'s injuries and blamed others for the injuries without any reliable evidence to support their claims. In dispositional finding of fact number 7, the trial court found that respondents were "directed . . . to participate in the Family PRIDE Program to include individual counseling or therapy for each parent by a therapist approved by DSS and the [guardian ad litem]."

Respondents assert that they made efforts at cooperating with social workers and complying with their case plan. Respondents note that prior orders of the court allowed them to participate in "comparable" programs approved by DSS and the guardian ad litem. Respondents contend that they sought approval of alternative programs and attended these programs, but that their attempts at gaining approval of these programs were ignored. Finally, respondent-mother argues that she should not be faulted for refusing to admit that she injured the older sibling, noting that she has steadfastly maintained her innocence and is not required to prove her innocence.

We find respondents' arguments unpersuasive. Maria Mucciacciaro, a DSS social worker, testified that she met with respondents and specifically told them that the classes they were taking would not be accepted as an alternative to the Family PRIDE program. Mucciacciaro testified that DSS was aware of the program attended by respondents, and that although she and her supervisor reviewed the program, "[they] did not feel that this program would be a good program for [respondents], nor did [they] feel like there would be any success rate with it." Among the reasons stated by

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Mucciacciaro were that the program attended by respondents did not do drug testing, there were concerns whether the teacher of the class was qualified, and the program was not as “in-depth” a program in comparison to the PRIDE program.

Furthermore, as we have noted, respondents are estopped from arguing that they were not responsible for L.G.’s injuries. Dr. Sharon Cooper testified that:

If you have a parent who is unable ever to acknowledge culpability with respect to the severe injuries that a previous child has had, as is the case in this circumstance, the risk for injury of subsequent infants is significantly elevated, and it is for that particular reason—according to the literature, if a person has shaken a baby once, their risk for re-injury is 77 percent, three out of four times. They must come to an understanding that shaking the infant is causing the infant harm.

Therefore, we conclude that there was clear, cogent, and convincing evidence in the record to support the trial court’s adjudicatory findings of fact numbers 12, 23 and 24, and dispositional findings numbers 6 and 7.

In finding of fact number 18, the trial court found that respondents “refused (discouraged) to allow home visitation by the social worker after August 2005.” Similarly, in finding of fact number 25(iv), the court found that “[h]ome visits were discouraged by the mother.” We find sufficient evidence in the record to support the trial court’s findings. Mucciacciaro testified that in June, 2005, she attempted to set up a home visit with respondents but was told that “it wasn’t convenient.” Mucciacciaro offered to come “after regular hours,” but was again told that it “wasn’t convenient.” Mucciacciaro finally asked if there was any time that she could come, and was told, “No, it’s not convenient.” Similarly, in August, 2005, Mucciacciaro attempted to set up home visits, and respondents told her, “It’s a bad week” Again, Mucciacciaro offered to visit after regular hours, but respondents continued to tell her it was a “bad week.” Mucciacciaro testified that “I don’t think I was ever able to schedule a visit—home visit after that.”

In finding of fact number 25(iii), the trial court found that respondents were “consisitently [sic] 15 minutes late to the visitations over the last several months for the announced reason that traffic had made them late.” We find sufficient evidence in the record

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to support the trial court's finding. A DSS court report stated that while respondents attended all visitations, "over the last several months they are consistently on average 15 minutes late to the visitations, most of the time saying that traffic had made them late." Additionally, Mucciacciaro testified that respondents consistently visited N.G., but were "late some." Moreover, respondent-father admitted at the hearing that they were late for visits because they had to drive from New Jersey.

Respondents additionally challenge dispositional finding of fact number 5, in which the trial court stated that it had "reviewed the exhibits offered by the parents but [did] not find the same to be credible on the issue of the juvenile's safety and best interest." Respondent-mother contends that the evidence was competent, and that she "cannot determine on what basis these exhibits were not 'credible'" We hold that the trial court did not err. It is the "judge's duty to weigh and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom." *In re Whisnant*, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984) (citation omitted).

In finding of fact number 27, the trial court found that DSS "was unable to exercise further efforts to prevent the filing of the petition herein and placement of the juvenile in care was necessary for the protection and safety of the juvenile." Similarly, adjudicatory conclusion of law number 3 states that DSS was "unable to prevent placement of the juvenile into out of home care, and the filing of the petition was necessary to protect the juvenile and the placement of the juvenile in care could not be prevented." Respondents contend that N.G. was being appropriately cared for and removal was not necessary for her protection. We disagree. As we have noted, respondents' arguments regarding L.G.'s injuries are not persuasive. Furthermore, Dr. Cooper testified that respondents' failure to acknowledge culpability for L.G.'s injuries put N.G. at risk of injury. When combined with the fact that respondents did not cooperate with DSS and failed to improve their parenting skills, the evidence supports the trial court's finding of fact and conclusion of law.

In dispositional findings of fact 6, 8, and 9, the trial court found that a plan of reunification would be futile, custody should be awarded to DSS, and visitation should be terminated. Respondent-mother renews her contention that her unwillingness to admit causing L.G.'s injuries should not result in the cessation of reunification

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efforts. Respondent-mother also argues that she should not be faulted for DSS's refusal to approve alternative programs. Respondent-mother finally asserts that the trial court should have considered a kinship placement. We find respondent-mother's arguments unpersuasive. The question of fault for L.G.'s injuries is not before this court. Moreover, DSS presented evidence that these alternative programs were not comparable.

[3] The trial court also did not err by declining a kinship placement. DSS completed kinship assessments with all relatives suggested by respondents. Indeed, the record shows that "all suggested kinship placements have been exhausted." Family placement was inappropriate because the family members did not believe that N.G. was in need of protection, and relative placement would therefore not ensure the child's safety. Accordingly, because competent evidence in the record supports the trial court's findings of fact and conclusions of law, the assignments of error are overruled.

II.

[4] Respondents next argue that the trial court erred by adjudicating N.G. a neglected juvenile. Respondent-mother argues that the trial court erred in adjudicating N.G. neglected based solely on L.G.'s injuries in the absence of clear, cogent and convincing evidence that respondents inflicted the injuries. Respondent-father argues that the trial court must be reversed because the evidence on probability of neglect is insufficient. Respondents both assert that N.G. was found to be healthy and well-cared for when removed from their home.

After careful review of the record, briefs, and contentions of the parties, we affirm. In an abuse, neglect, and dependency case, review is limited to the issue of whether the conclusion is supported by adequate findings of fact. *Helms*, 127 N.C. App. at 511, 491 S.E.2d at 676. "Neglected juvenile" is defined in N.C. Gen. Stat. § 7B-101(15) as:

A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15) (2005). Section 7B-101(15) affords "the trial court some discretion in determining whether children are at

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risk for a particular kind of harm given their age and the environment in which they reside.” *In re McLean*, 135 N.C. App. 387, 395, 521 S.E.2d 121, 126 (1999). “In cases of this sort [involving a newborn], the decision of the trial court must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case.” *Id.* at 396, 521 S.E.2d at 127.

The question of responsibility for L.G.’s injuries is not currently before us. Moreover the trial court adopted as fact testimony that there is a high rate of recidivism where parents do not acknowledge culpability for the injuries a child incurred while in their care. The trial court then found that respondents continued to deny responsibility for L.G.’s injuries. Therefore, the findings relating to the prior adjudication of neglect and subsequent termination of parental rights as to L.G. and respondents’ failure to comply with their case plan, when combined with respondents’ failure to acknowledge culpability for L.G.’s injuries, support the conclusion that N.G. was a neglected juvenile based on the high risk of future abuse or neglect. *See In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005) (affirming adjudication of neglect where respondent violated court-ordered protection plans and failed “to take responsibility for harm that befell her children as a result of her conduct”); *McLean*, 135 N.C. App. at 396, 521 S.E.2d at 127 (noting that substantial risk of future neglect must be based on the historical facts of the case).

We acknowledge that the fact of prior abuse, standing alone, is not sufficient to support an adjudication of neglect. Indeed, this Court recently held that although evidence of prior abuse or neglect is a relevant factor worthy of consideration, the doctrine of collateral estoppel permits the trial court to rely on only those findings of fact from prior orders that “were established by clear and convincing evidence.” *In re A.K.*, 178 N.C. App. 727, 731, 637 S.E.2d 227, 229 (2006).

However, this case is easily distinguished from *In re A.K.* In that case, “the trial court did not accept any formal evidence in addition to its consideration of the prior court orders concerning [the child previously removed from the home], and the only order concerning [the child previously removed from the home] that contained findings by the clear and convincing standard of proof was from a hearing occurring many months earlier.” *Id.* at 732, 637 S.E.2d at 230. In this case, the trial court also addressed (1) respondents’ failure to participate in the PRIDE program, (2) respondents’ attempts to hide the fact of the mother’s pregnancy, (3) respondents’ failure to inform DSS

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with a change of address, (4) respondents' continued refusal to accept responsibility for L.G.'s injuries, (5) respondents' failure to participate in anger management classes, (6) respondents' consistent tardiness to visits, (7) respondents' attempts to discourage home visits from DSS, and (8) evidence on recidivism rates. The cumulative weight of this evidence is sufficient to support an adjudication of neglect. Accordingly, we find that the trial court did not err by adjudicating N.G. a neglected juvenile.

III.

[5] Respondents next argue that the evidence and findings of fact do not support that the trial court's conclusion of law that reunification efforts should cease and that visitation should be terminated. We are not persuaded.

N.C. Gen. Stat. § 7B-507(b) states that:

In any order placing a juvenile in the custody or placement responsibility of a county department of social services, whether an order for continued nonsecure custody, a dispositional order, or a review order, the court may direct that reasonable efforts to eliminate the need for placement of the juvenile shall not be required or shall cease if the court makes written findings of fact that:

(1) Such efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time.

N.C. Gen. Stat. § 7B-507(b) (2005). The trial court may "only order the cessation of reunification efforts when it finds facts based upon credible evidence presented at the hearing that support its conclusion of law to cease reunification efforts." *In re Weiler*, 158 N.C. App. 473, 477, 581 S.E.2d 134, 137 (2003). "This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007). "At the disposition stage, the trial court solely considers the best interests of the child. Nonetheless, facts found by the trial court are binding absent a showing of an abuse of discretion." *In re Pittman*, 149 N.C. App. 756, 766, 561 S.E.2d 560, 567 (2002) (citations and quotations omitted). "An abuse of discretion occurs when

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the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *In re Robinson*, 151 N.C. App. 733, 737, 567 S.E.2d 227, 229 (2002) (citations and quotations omitted).

Here, the trial court found in dispositional finding of fact number 6 that:

DSS has been involved with the respondent parents since 2001 when their first child was placed into protective custody. They have failed to cooperate with the various social workers and failed to fully comply with family service plans. They did not make reasonable efforts at reunification in their first child's care. Although they entered into a service agreement (updates) with their second child, they have not met the goals outlined in the service plans within a reasonable time. They concealed their third child from DSS and expressly failed to tell the truth about the possible pregnancy. The parents have not recognized appropriate responsibility or involvement in the injuries to their first child. They deny responsibility or involvement with the injuries but placed the blame for the injuries on others without any reliable evidence being produced. They refused an appropriate course of treatment to obtain parental education, supervision, instruction and behavioral counseling. There has not been an adequate attempt on their behalf to cooperate with a safety plan to assure the juvenile's safety. Their lack of candor, truthfulness and cooperation further complicates the issue of the juvenile's safety if placed with the parents.

As discussed previously, we have concluded that dispositional finding of fact number 6 was supported by clear, cogent, and convincing evidence in the record. We further conclude that the finding supports the trial court's conclusion that reunification efforts would be futile.

Respondents further contend that the trial court erred by ceasing visitation. "This Court reviews the trial court's dispositional orders of visitation for an abuse of discretion." *In re C.M.*, 183 N.C. App. at 215, 644 S.E.2d at 595. In light of the historical facts of the case, respondents' failure to accept responsibility for L.G.'s injuries, their failure to cooperate with DSS and comply with their case plan, and the trial court's conclusion that reunification efforts should cease, we hold that the trial court's decision to cease visitation was not manifestly unsupported by reason. Accordingly, we hold that the court did not abuse its discretion in finding it to be in the best interests of the juvenile to cease reunification efforts and visitation.

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Affirmed.

Judge McGEE concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge dissenting.

The majority's opinion holds that: (1) DSS presented clear, cogent, and convincing evidence to support the trial court's findings of fact and conclusions of law; (2) the trial court did not err by adjudicating N.G. to be a neglected juvenile; and (3) the trial court did not abuse its discretion in finding reunification efforts to be futile and that it was in N.G.'s best interests to cease reunification efforts and visitation with respondents. I disagree and respectfully dissent.

I. Adjudicatory Hearing

A. Standard of Review

The trial court's and our standard of review is well established.

The first stage [of juvenile abuse, neglect, and dependency actions] is the adjudicatory hearing. If DSS presents clear and convincing evidence of the allegations in the petition, the trial court will adjudicate the child as an abused, neglected, or dependent juvenile. If the allegations in the petition are not proven, the trial court will dismiss the petition with prejudice and, if the juvenile is in DSS custody, returns the juvenile to the parents.

In re A.K., 360 N.C. 449, 454-55, 628 S.E.2d 753, 757 (2006) (internal citations omitted).

During the adjudicatory phase, the court takes evidence, makes findings of fact, and determines the existence or nonexistence of grounds for termination. N.C. Gen. Stat. § 7B-1109(e) (2005). The burden of proof rests upon DSS in this phase, and the court's findings must be based on clear, cogent, and convincing evidence. N.C. Gen. Stat. § 7B-1109(f) (2005).

The standard of review on appeal is whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether its conclusions of law are supported by its findings of fact. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *disc. rev. denied and appeal dismissed*, 353 N.C. 374, 547 S.E.2d 9

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(2001). “This intermediate standard is greater than the preponderance of the evidence standard required in most civil cases, but not as stringent as the requirement of proof beyond a reasonable doubt required in criminal cases.” *In re Montgomery*, 311 N.C. 101, 109-10, 316 S.E.2d 246, 252 (1984) (citing *Santosky v. Kramer*, 455 U.S. 745, 71 L. Ed. 2d 599 (1982)). “The trial court’s ‘conclusions of law are reviewable *de novo* on appeal.’” *In re D.M.M. & K.G.M.*, 179 N.C. App. 383, 383, 633 S.E.2d 715, 716 (2006) (quoting *In re D.H.*, 177 N.C. App. 700, 703, 629 S.E.2d 920, 922 (2006)).

B. Analysis

Adjudicatory findings of fact numbered 5 and 27 are not supported by clear, cogent, and convincing evidence. *In re A.K.*, 360 N.C. at 454-55, 628 S.E.2d at 757.

The trial court’s adjudicatory finding of fact numbered 5 states:

[N.G.] has lived in an environment injurious to her welfare when she was allowed to live in a home where another child [L.G.] had been subjected to abuse and neglect by an adult who regularly lives in that home without that *adult having received adequate treatment of the condition which led to the abusive acts upon the older sibling.*

(Emphasis supplied).

If DSS makes no showing that neglect has continued at the time of the hearing, evidence of changed circumstances must be considered “in light of the evidence of prior neglect and the probability of a repetition of neglect.” *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984). Here, DSS made no showing of any neglect of N.G. prior to or at the time of the hearing and respondents have proved they made reasonable efforts and received “adequate treatment” to alleviate the conditions that led to N.G.’s removal from their home. *Id.*

N.G. was healthy and uninjured when she was removed from respondents’ home and placed into DSS’s care at two months of age. All allegations of neglect were derived and solely based upon another child having been previously removed from respondents’ home.

Respondents completed parenting, domestic violence, and anger management classes after L.G. was removed from the respondents’ home. Respondents moved to New Jersey in September 2005 and have been commuting to North Carolina for their weekly visits with N.G. since that time. Respondents have not missed any scheduled vis-

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its. Adjudicatory finding of fact numbered 5 is not supported by clear, cogent, and convincing evidence. The evidence clearly compels a contrary finding.

The trial court's adjudicatory finding of fact numbered 27 states, "[DSS] was unable to exercise further efforts to prevent the filing of the petition herein and placement of the juvenile in care was necessary for the protection and safety of the juvenile."

No family services case plan was established for N.G. The case plan cited by the trial court in its adjudicatory order pertained to J.G., respondents' second child. This case plan was established prior to DSS obtaining custody of N.G. The record shows DSS made no attempt to implement or restate this case plan for N.G.

The case plan for J.G. states that "[respondents] shall participate in Pride program or *other comparable program[s]* in Cumberland Co. or *other area program* upon consultation with DSS [and *Guardian ad Litem*]." (Emphasis supplied). DSS claimed that all other programs were not comparable because, *inter alia*, those programs did not require random drug testing. No allegations were made and no evidence was shown of any drug abuse by either of respondents. Respondents were not required by the case plan or order to submit to random drug testing. Respondents were unable to participate in the Family PRIDE program due to scheduling conflicts of that program with respondent-father's work schedule.

DSS refused to respond to suggestions and requests to review multiple alternative agencies and providers whose programs would allow respondents to maintain employment. Undisputed evidence shows respondents submitted two written requests for DSS to review listed programs as "comparable" substitutes for the Family PRIDE Program. The first request, dated 10 November 2005, listed fourteen agencies and providers conducting parenting and anger management classes. The second request, dated 7 December 2005, listed eleven additional possible programs. No evidence in the record shows DSS ever reviewed or responded to any of respondents' requests.

Respondents attended and successfully completed parenting, domestic violence, and anger management classes as required by J.G.'s case plan with Multicultural Community Development Services, a parenting and family development center. While DSS never deemed Multicultural Community Development Services to be a "comparable" provider, the record shows DSS never made any attempt to advise or help respondents find an alternative program that did not conflict

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with respondent-father's employment; and consequently, respondents' ability to maintain housing and basis of support for their family. Adjudicatory finding of fact numbered 27 is not supported by clear, cogent, and convincing evidence. The evidence clearly compels a contrary result and admonition to DSS to consult, respond, and cooperate with respondents on alternative treatment programs.

Reviewed *de novo*, the trial court's adjudicatory conclusions of law numbered 2 and 3 state:

2. [N.G.] is a neglected as defined by N.C. Gen. Stat. 7B-101(15) because the juvenile has been allowed to live in an environment injurious to the juvenile's welfare.
3. [DSS] was unable to prevent placement of [N.G.] into out of home care, and the filing of the petition was necessary to protect [N.G.] and the placement of [N.G.] in care could not be prevented.

Since adjudicatory findings of fact numbered 5 and 27 are not supported by clear, cogent, and convincing evidence, these findings cannot support the trial court's conclusions of law. Under *de novo* review, the trial court's conclusions of law are not supported by the findings of fact based upon clear, cogent, and convincing evidence and are error. The trial court's unsupported conclusions and adjudication of N.G. to be a neglected juvenile should be reversed.

II. Dispositional Hearing

Because the trial court's adjudicatory findings of fact do not support its conclusions of law, the trial court's dispositional order must also be reversed. Presuming, as the majority's opinion holds, that the trial court's conclusions of law are supported by the findings of fact and its conclusions and adjudication of N.G. to be a neglected juvenile should be affirmed, the trial court also erred when it ordered further reunification efforts would be futile and ceased respondents' visitation.

We have recognized the constitutional protection afforded to family relationships. *See In re Webb*, 70 N.C. App. 345, 350, 320 S.E.2d 306, 309 (1984) ("[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04, 52 L. Ed. 2d 531, 540 (1977))). The purposes and policies of the Juvenile Code

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recited under N.C.G.S. § 7B-100 are applicable to permanency planning hearings.

The trial court's findings and conclusions were not supported by the evidence, did not consider changed conditions, and did not recognize that *the purpose of the Juvenile Code is "return of juveniles to their homes consistent with preventing the unnecessary or inappropriate separation of juveniles from their parents."* See N.C. Gen. Stat. § 7B-100(4).

In re Eckard, 148 N.C. App. 541, 547, 559 S.E.2d 233, 236-37 (emphasis supplied), *disc. rev. denied*, 356 N.C. 163, 568 S.E.2d 192 (2002). Respondents informed DSS of their alternate compliance with J.G.'s case plan and provided the trial court with undisputed evidence of the treatment they received and completed. Respondents made diligent efforts to remedy the causes that led to N.G.'s removal. Respondents cannot be limited by DSS to a single source service provider whose program schedule conflicts with and jeopardizes respondent-father's employment and means of support. J.G.'s case plan expressly allows for "other comparable program[s]" and "other area program[s]." DSS never responded to two distinct written requests to review or recommend alternative plans or service providers. The trial court erred when it ordered that reunification efforts would be futile and that visitation cease.

III. Conclusion

N.G. was healthy and unharmed when DSS removed her from respondents' home. No case plan was established or restated for N.G. No clear, cogent, and convincing evidence supports the trial court's adjudicatory findings of fact that "[N.G.] lived in an environment injurious to her welfare" and the "placement of [N.G.] in care was necessary for [her] protection and safety" No evidence exists and no finding of fact was made that any alleged neglect continued at the time of the hearing.

Under *de novo* review, the trial court's findings of fact are not supported by clear, cogent, and convincing evidence, and these findings do not support the conclusions of law that "[N.G.] is a neglected as defined by N.C. Gen. Stat. 7B-101(15)" and "the filing of the petition was necessary to protect [N.G.]" The trial court's adjudicatory order should be reversed.

Because the trial court erred in entering its adjudicatory order, it also erred in concluding at disposition that "[t]he development of a

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plan of reunification of the child with the parents would be futile” and “[f]urther parental visitation should be ceased.” Respondents drove from New Jersey to visit N.G. and never missed a weekly visitation. The trial court’s dispositional order should be reversed.

N.C. Gen. Stat. § 7B-100(4) (2005) requires DSS to assist respondents and presumes reunification of N.G. with her parents will occur. DSS failed to respond to respondents’ repeated requests to review alternative programs with schedules that would not jeopardize respondent-father’s employment and failed to overcome the statutory presumption of reunification. Respondents made substantial progress toward alleviating the conditions that led to N.G.’s removal from respondents’ home. No evidence was presented to support the conclusion that further efforts to reunify N.G. with her parents would be futile. I vote to reverse the trial court’s order and respectfully dissent.

MAXTON McDOWELL, WANDA H. McDOWELL, CLAUDE WINSLOW, AND BARBARA WINSLOW, PLAINTIFFS v. RANDOLPH COUNTY AND McDOWELL LUMBER COMPANY, INC., DEFENDANTS

No. COA06-1533

(Filed 18 September 2007)

1. Laches— rezoning—defense raised by county—no injury shown

The trial court did not err by refusing to grant summary judgment for defendant county on the defense of laches in an action which sought to invalidate a rezoning. Although the company which sought the rezoning invested substantial sums in reliance on defendant’s actions, the evidence does not demonstrate that defendant itself sustained any injury.

2. Zoning— illegal spot zoning—lumberyard

The trial court did not err by concluding that a rezoning to permit a lumberyard, a saw-mill, and related operations was illegal spot zoning, considering the size of the tract; the existing comprehensive zoning plan; the benefit and detriment to the owner, the neighbors, and the community; and the relationship of the proposed uses to current uses.

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3. Mandamus— to enforce zoning plan—third party injury—mandamus not appropriate

The trial court did not err by denying plaintiff's request for a writ of mandamus to enforce the zoning plan in place before an illegal spot zoning. Mandamus is not appropriate when it injuriously affects the rights of those not parties to the action; the landowner here had been dismissed from the action and would be injuriously affected by the mandamus.

Appeal by plaintiffs and cross-appeal by defendants from order entered 28 September 2006 by Judge Charles C. Lamm in Randolph County Superior Court. Heard in the Court of Appeals 6 June 2007.

The Brough Law Firm, by Robert E. Hornik, Jr., for plaintiff-appellants/cross-appellees.

Gavin Cox Pugh and Wilhoit LLP, by Alan V. Pugh and Darren C. Allen, for defendant-appellees/cross-appellants.

JACKSON, Judge.

Maxton and Wanda McDowell ("the McDowells") and Claude and Barbara Winslow ("the Winslows") (collectively, "plaintiffs") brought an action against Randolph County ("defendant") and McDowell Lumber Company, Inc. ("MLC"), requesting that the trial court, *inter alia*, (1) invalidate defendant's rezoning of a portion of MLC's property; (2) enjoin certain operations at the MLC property; and (3) issue *mandamus* ordering defendant to enforce its zoning ordinance against the MLC property. The trial court granted summary judgment for plaintiff in part and for defendant in part. For the following reasons, we affirm.

The McDowells own a home located adjacent to MLC's property in Randolph County, and the Winslows own a home located adjacent to and east of MLC's property. Defendant has in effect a Unified Development Ordinance ("UDO"), adopted on 6 July 1987. According to the UDO, a portion of MLC's property lies in a Light Industrial zoning district ("LI"), and the balance of the property is zoned Residential Agricultural ("RA"). The surrounding areas, including plaintiffs' properties, all are zoned RA. Pursuant to the UDO, permanent sawmills and planing mills are prohibited in both the RA and LI zoning districts. MLC has on its property a lumber yard, a permanent saw mill, a pallet-making operation, and other related milling opera-

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tions. A portion of MLC's operation existed prior to the adoption of the UDO in 1987.

On 4 February 2002, defendant adopted the Randolph County Growth Management Plan ("GMP"), in which it designated the tract at issue as "Rural Growth." Between March 2000 and December 2004, MLC routinely sought and obtained building permits from defendant, notwithstanding continued zoning as LI and RA. During this time, MLC expanded its operations further into the portion of its property zoned RA, and in late 2004, MLC erected an 800 square foot kiln building and an 8,000 square foot addition to an existing building within twenty feet of the Winslows' property.

Plaintiffs allege that MLC's operation results in noise pollution, air pollution resulting from sawdust and fumes, and increased truck traffic, all of which cause injury to the value of their properties and diminution in their ability to use and enjoy their properties. Defendant alleges that MLC is in compliance with all applicable state regulations with respect to air pollution, water contamination, and vehicular traffic issues. Defendant also notes that the UDO specifically recognizes uses in place at the time of the initial adoption as lawful either by zoning classification or as non-conforming uses. Further, defendant argues that at the time of the adoption of the UDO in 1987, MLC's property mistakenly was designated LI and RA when it should have been designated Heavy Industrial ("HI"). Defendant has treated the property as if it had been properly zoned or as if MLC's operations constituted valid, pre-existing, non-conforming uses under the UDO.

On 18 November 2004, MLC applied to defendant to change the zoning classification of its property from LI and RA to Heavy Industrial/Conditional Use ("HI-CU"). On 7 February 2005, the application was brought for review at a public hearing, during which plaintiffs and their family members voiced their objections to the rezoning, citing inconsistencies between the use of the property and the UDO and the GMP. On 2 May 2005, the Randolph County Board of Commissioners approved MLC's rezoning application. Plaintiffs contested the decision, alleging that they have been damaged by defendant's failure to enforce the UDO and that defendant engaged in illegal spot zoning by rezoning MLC's property.

On 25 May 2005, plaintiffs filed an amended complaint and petition for writ of *mandamus*. On 18 September 2006, the trial court held a hearing on cross-motions for summary judgment, and plaintiffs

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thereafter voluntarily dismissed MLC from their lawsuit. On 28 September 2006, the trial court entered an order granting plaintiffs' motion for summary judgment in part, declaring that defendant's rezoning decision on 2 May 2005 constituted illegal spot zoning and, therefore, was null and void. The trial court, however, denied plaintiffs' request that defendant be required to enforce the UDO against MLC and thereby limit the use of MLC's property to operations as they existed on 6 July 1987. Plaintiffs and defendant both filed timely notice of appeal.

On appeal, plaintiffs contend that the trial court (1) properly declared the rezoning of MLC's property null and void;¹ and (2) erred in denying plaintiffs' petition for writ of *mandamus*. On cross-appeal, defendant contends that the trial court erred (1) in not granting summary judgment for defendant pursuant to the doctrine of laches; and (2) in concluding that defendant's action constituted illegal spot zoning.

The standard of review from an order allowing summary judgment is well-established: "We review a trial court's order for summary judgment de novo to determine whether there is a 'genuine issue of material fact' and whether either party is 'entitled to judgment as a matter of law.'" *Robins v. Town of Hillsborough*, 361 N.C. 193, 196, 639 S.E.2d 421, 423 (2007) (quoting *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003)). Here, since the parties stipulated before the trial court that there existed no disputed issue of material fact, "[w]e need only determine whether summary judgment was properly entered in plaintiffs' favor, or conversely should have been entered in favor of defendant." *Geitner v. Mullins*, 182 N.C. App. 585, 589, 643 S.E.2d 435, 438 (2007).

[1] In its first cross-assignment of error, defendant contends that the trial court erred in not granting summary judgment for defendant pursuant to the doctrine of laches. We disagree.

"[L]aches is an affirmative defense. It must be pleaded and the burden of proof is on the party who pleads it." *Taylor v. City of Raleigh*, 290 N.C. 608, 622, 227 S.E.2d 576, 584 (1976). In the instant case, defendant specifically and affirmatively pled the doctrine of laches. The trial court, however, failed "to make any finding, reach any conclusion or otherwise rule on the[] plea." *Stutts v. Swaim*, 30

1. Although plaintiffs raised this issue in their brief as appellants, plaintiffs properly should have addressed this issue in their brief as appellees, since it was defendant who assigned error to this issue.

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N.C. App. 611, 615, 228 S.E.2d 750, 753, *disc. rev. denied*, 291 N.C. 178, 229 S.E.2d 692 (1976). Therefore, we must determine “whether the evidence was sufficient to establish a prima facie showing of laches and to require a finding and conclusion by the court.” *Id.*

“In equity, where lapse of time has resulted in some change in the condition of the property or in the relations of the parties which would make it unjust to permit the prosecution of the claim, the doctrine of laches will be applied.” *Teachey v. Gurley*, 214 N.C. 288, 294, 199 S.E. 83, 88 (1938). As our Supreme Court later clarified, “the mere passage or lapse of time is insufficient to support a finding of laches; for the doctrine of laches to be sustained, the delay must be shown to be unreasonable and *must have worked to the disadvantage, injury or prejudice of the person seeking to invoke it.*” *Taylor*, 290 N.C. at 622-23, 227 S.E.2d 584-85 (emphasis added) (internal quotation marks and citation omitted).

In the case *sub judice*, regardless of the passage of time, defendant, as the party seeking to invoke the defense of laches, has not demonstrated prejudice resulting from any alleged delay in plaintiffs’ initiating this action. Although the record indicates that MLC has invested substantial sums of money in reliance on defendant’s actions, defendant has failed to argue and the evidence fails to demonstrate that defendant itself has sustained any injury. Accordingly, defendant’s cross-assignment of error is overruled.

[2] In its second cross-assignment of error, defendant contends that the trial court erred in concluding that its zoning action with respect to MLC’s property constituted illegal spot zoning. We disagree.

“Zoning, as a definitional matter, is the regulation by a local governmental entity of the use of land within a given community, and of the buildings and structures which may be located thereon.” *Chrismon v. Guilford County*, 322 N.C. 611, 617, 370 S.E.2d 579, 583 (1988). “[A]s a general proposition, a municipality’s zoning actions are presumed to be reasonable and valid.” *Good Neighbors of S. Davidson v. Town of Denton*, 355 N.C. 254, 258 n.2, 559 S.E.2d 768, 771 (2002). This presumption, however, is set aside when a municipality’s actions constitute spot zoning. *See id.* Spot zoning has been defined as a zoning action that “singles out and reclassifies a relatively small tract owned by a single person and surrounded by a much larger area uniformly zoned, so as to . . . relieve the small tract from restrictions to which the rest of the area is subjected.” *Blades v. City of Raleigh*, 280 N.C. 531, 549, 187 S.E.2d 35, 45 (1972). “[I]n any spot

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zoning case in North Carolina courts, two questions must be addressed by the finder of fact: (1) did the zoning activity in the case constitute spot zoning as our courts have defined that term; and (2) if so, did the zoning authority make a clear showing of a reasonable basis for the zoning.” *Chrismon*, 322 N.C. at 627, 370 S.E.2d at 589.

In the case *sub judice*, defendant does not dispute that the rezoning constituted spot zoning, and therefore, this issue is not before us. See N.C. R. App. P. 10(a), 28(b)(6) (2006). The dispute, instead, centers on the validity of the spot zoning, with the trial court’s concluding that “[t]here is no clear showing of a reasonable basis for this rezoning. The undisputed evidence is that there is no accompanying benefit to the plaintiffs and no benefit to the surrounding community or to the public interest.” On appeal, defendant contends “that the action of Randolph County was permissible, valid, and lawful spot zoning.” We disagree.

“[A] judicial determination as to the existence or nonexistence of a sufficient reasonable basis in the context of spot zoning is, and must be, the product of a complex of factors.” *Chrismon*, 322 N.C. at 628, 370 S.E.2d at 589 (internal quotation marks and citation omitted).

The North Carolina Supreme Court has enumerated several factors that are relevant to a showing of the existence of a sufficient reasonable basis for spot zoning.

1. The size of the tract in question.
2. The compatibility of the disputed action with an existing comprehensive zoning plan.
3. The benefits and detriments for the owner, his neighbors and the surrounding community.
4. The relationship of the uses envisioned under the new zoning and the uses currently present in adjacent tracts.

Covington v. Town of Apex, 108 N.C. App. 231, 238, 423 S.E.2d 537, 541 (1992) (citing *Chrismon*, 322 N.C. at 628, 370 S.E.2d at 389), *disc. rev. denied*, 333 N.C. 462, 427 S.E.2d 620 (1993).

“The first factor is the size of the tract in question.” *Id.* Although the size of the property is not dispositive, our Courts have found illegal spot zoning present in cases in which the tract of land at issue ranged from 0.58 acres, see *Mahaffey v. Forsyth County*, 99 N.C. App. 676, 394 S.E.2d 203, *aff’d*, 328 N.C. 323, 401 S.E.2d 365 (1991) (per

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curiam), to fifty acres. *See Good Neighbors*, 355 N.C. 254, 559 S.E.2d 768. Here, the tract of land, which amounted to 29.95 acres, falls squarely within that range. Defendant approved MLC's application to rezone a 29.95-acre portion of its 120.30-acre property from the LI and RA districts to the HI-CU district. The remaining 90.35 acres, or approximately seventy-five percent, of MLC's property remains zoned LI or RA; the land surrounding MLC's property, which plaintiff Maxton McDowell estimated as comprising thousands of acres and which includes plaintiffs' property, remains uniformly zoned RA.

"The second factor is the compatibility of the disputed action with an existing comprehensive zoning plan. 'Zoning generally must be accomplished in accordance with a comprehensive plan in order to promote the general welfare and serve the purpose of the enabling statute.' " *Covington*, 108 N.C. App. at 238, 423 S.E.2d at 541 (quoting *Alderman v. Chatham County*, 89 N.C. App. 610, 615-16, 366 S.E.2d 885, 889, *disc. rev. denied*, 323 N.C. 171, 373 S.E.2d 103 (1988)). Pursuant to North Carolina General Statutes, section 153A-341, "[z]oning regulations shall be made in accordance with a comprehensive plan" and "shall be designed to promote the public health, safety, and general welfare." N.C. Gen. Stat. § 153A-341 (2005).

In the instant case, defendant adopted the UDO on 6 July 1987 and the GMP on 4 February 2002. Through both the UDO and the GMP, defendant's comprehensive zoning plan has included the goal of separating incompatible land uses and ensuring that such uses are not placed immediately adjacent to one another. According to the UDO, the purpose of the RA district

is to provide a place for agricultural operations; forestry; scattered non-farm residences on traditional rural lots while preserving rural open space and natural heritage assets. To maintain rural character[,], only minor conventional residential subdivisions are allowed in this District.

The HI-CU district, to which defendant rezoned a portion of MLC's property, encompasses the same regulations as the HI district and "is designed to accommodate those industries whose normal operations include dust, noise, odor, or other emissions which may be deemed objectionable." Similarly, the GMP expressly provides that "[i]ndustrial development should not be located in areas that would diminish the desirability of existing and planned residential uses." The tract at issue in the instant case is located within an area in the GMP characterized as a "Rural Growth Area," which is comprised of predomi-

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nantly agricultural and rural residential development. The GMP notes as a “Development Consideration[.]” that “[c]onflict among incompatible land uses can be extreme” in a rural growth area. Therefore, as a “Development Polic[y],” the GMP “[r]equire[s] dedicated open space as a buffer between incompatible land uses.”

Here, the tract that defendant rezoned as HI-CU is surrounded by land uniformly zoned RA and is immediately adjacent to property developed for residential uses. As a result, plaintiffs’ properties, along with other properties zoned RA, have experienced some of the problems that the UDO and the GMP exist to prevent. Specifically, during the rezoning public hearing on 7 February 2005, residents noted increased and sustained noise, increased odor pollution, increased sawdust emission, heightened traffic and safety concerns, and the likelihood of diminished property values. These problems have been exacerbated by the fact that no substantial buffer between the HI-CU land and plaintiffs’ land has been established, even though the GMP requires such a buffer between heavy industrial sites and residential areas.

Although some of MLC’s operations existed prior to the adoption of the UDO and the GMP, the record reflects that MLC’s application for rezoning coincided with an expansion of its operations in late 2004—namely, MLC added a pallet-making operation, located directly adjacent to the Winslows’ property. In late 2004, defendant issued building permits and zoning permits for new structures on MLC’s property, including an 800 square foot kiln building and an 8,000 square foot addition to an existing building within twenty feet of the Winslows’ property. The UDO, however, provides that “it is the intent of this ordinance to permit these non-conformance[s] to continue until they are removed . . . , but not to encourage their continuance.”

By approving MLC’s rezoning application, defendant acted “in direct contravention of its comprehensive zoning plan.” *Covington*, 108 N.C. App. at 239, 423 S.E.2d at 541; *see also Good Neighbors*, 355 N.C. at 262, 559 S.E.2d at 774 (finding “no evidence demonstrating compatibility between the rezoning and an existing comprehensive plan”).

“The third relevant factor is the benefits and detriments to the owner, his neighbors and the surrounding community.” *Covington*, 108 N.C. App. at 239, 423 S.E.2d at 542. As our Supreme Court stated in *Chrismon*, “[t]he standard is not the advantage or detriment to particular neighboring landowners, but rather *the effect upon the entire*

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community as a social, economic and political unit.” Chrismon, 322 N.C. at 629, 370 S.E.2d at 590 (emphasis added) (internal quotation marks and citation omitted).

Here, defendant asserts that permitting “the continued operation of McDowell Lumber Company after 31 years . . . , with its investment and payroll exceeding 100 employees is in the public interest by increasing ‘economic activity, job creation, and the tax base of Randolph County.’” However, defendant presented no evidence of such benefits to the planning board, and there is no evidence in the record to support defendant’s assertion. *See Good Neighbors*, 355 N.C. at 258, 559 S.E.2d at 771 (“A zoning authority cannot satisfy the ‘clear showing of a reasonable basis’ requirement simply by cataloguing the many benefits it received as a result of the zoning change.”).

Defendant also contends that “the restrictive conditions, enforceable by the County, attached to the conditional use rezoning which were nonexistent before, . . . inure to the sole benefit of the two adjacent landowners.” Those conditions include: (1) obtaining clearance from the cable company before digging near a cable right-of-way; (2) not constructing buildings north of any existing structure facing Old N.C. Highway 49; (3) maintaining three rows of trees fronting Old N.C. Highway 49, three rows along MLC’s eastern property line, one row along the southeastern property line, and one row along the western property line; (4) relocating certain existing fans; (5) enclosing one wall of the pallet building with an insulated roof to reduce noise; (6) revamping the breathing and inspection portion of the sawdust waste bin to reduce dust; (7) reducing the number of outside lights by approximately one-half, contingent upon employee security; (8) establishing a schedule for truck traffic; (9) continuing to comply with provisions of the Occupational Safety and Health Act (“OSHA”) with respect to safety, noise, and air quality; and (10) continuing to comply with state and federal regulations with respect to stormwater run-off.

First, those opposing the rezoning application were not concerned with stormwater run-off, cable right-of-ways, or outside lighting.² Additionally, MLC had a pre-existing, ongoing duty to comply with state and federal laws. Furthermore, although defendants

2. Although defendant’s planning director stated during the 7 February 2005 hearing that these conditions were offered in response to issues raised by plaintiff Maxton McDowell at a planning board hearing in December 2004, the record fails to contain a transcript from that hearing, and, therefore, this Court is unable to determine what precise issues were raised in December 2004.

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drafted the conditions to include specific numbers of trees for different areas along the property line, the trees were to alleviate alleged concerns about “visual aesthetics.” There is no evidence in the record, however, from which this Court can determine how significant a buffer area the trees would create between plaintiffs’ properties and the MLC property, particularly considering that the trees previously acting as a buffer had been removed and that the proposed evergreens would take years to mature. Next, MLC promised to relocate certain fans on the exterior of the pallet building and to enclose one exterior wall, stating, “This is gonna [sic] help reduce noise.” The record, however, fails to demonstrate what effect these alterations would have on the noise levels. Finally, defendant promised to enclose “[t]he open breathing inspection hole at the top of the sawdust waste bin” and to install a new sheet metal pipe to channel sawdust, but the record does not include specific information with respect to projected dust reduction. Ultimately, the record fails to detail the precise effect that the conditions MLC agreed to impose upon its property would have “upon the entire community as a social, economic, and political unit.” *Chrismon*, 322 N.C. at 629, 370 S.E.2d at 590 (internal quotation marks and citation omitted), and plaintiffs contended at the hearing that “there are [no] . . . conditions whatsoever that can cure that situation.”

“On the other hand, there is ample evidence showing that the [rezoning action] will result in detrimental consequences for both neighbors of the property and the surrounding community.” *Good Neighbors*, 355 N.C. at 260, 359 S.E.2d at 773. This is demonstrated first by the fact that several people spoke in opposition to MLC’s rezoning application at the public hearing. In addition to plaintiffs’ attorney, plaintiff Maxton McDowell, plaintiff Barbara Winslow, and plaintiff Claude Winslow, the Winslow’s daughter, plaintiff Claude Winslow’s brother, Marian Mueller (“Mueller”), and Gaynelle Vionni (“Vionni”) also opposed the rezoning. *Compare Chrismon*, 322 N.C. at 630, 370 S.E.2d at 590 (“While this Court understands that it was the Chrismons alone who lived next door to the operation, we do note that it was the Chrismons, and *no one else*, who spoke up against the rezoning.” (emphasis in original)).

Among the detrimental consequences for the community is the increased truck traffic. As plaintiffs’ attorney explained, “[t]here are many safety issues here to deal with: truck traffic, truck parking, truck issues as they go along, forklifts going in and out,” particularly in light of the age and size of the main highway. Accordingly to plaintiff Claude Winslow,

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on January the 12th I took eight hours from eight o'clock in the morning till four o'clock in the afternoon and counted trucks. . . . I sat there and counted trucks all day going in and out of that sawmill. . . . You know how many there were? 156.

Later in the hearing, Mueller stated, "When we first started coming here, there was [sic] no logging trucks. . . . [N]ow it takes me 10 to 15 minutes to get to town, and I will pass one to two trucks every single time on that little road" Finally, we note, as we did in *Budd v. Davie County*, 116 N.C. App. 168, 176, 447 S.E.2d 449, 454 (1994), that "[a]ll of the area surrounding the rezoned land and the area surrounding the routes the trucks . . . would drive are residential and agricultural areas. There is no industry in the area"

Plaintiffs also presented evidence supporting their contention that MLC's operations resulted in increased noise and dust that impacted their ability to enjoy their property. The Winslows' daughter, Kim Huffman ("Huffman"), presented video evidence demonstrating the steady, loud noise generated by operations on MLC's property. Huffman's video also depicted how the sawdust produced by MLC covers vehicles owned by neighborhood residents. The noise and air pollution issues also were reflected in a letter written by Vionni, the tenant living at the Winslows' rental property:

Unfortunately, I will have to move as soon as possible due to pollution from the mill next door.

. . . .

I was aware of the mill when I moved here. At that that [sic] there was a buffer zone of trees between the house and the mill. Although the noise could be heard, it was tolerable. Although the mill was partially visible, the trees effectively blocked most of it, and the trees also served as [a] buffer for the dust—dust particles. Since the trees have been removed, the noise is extremely intrusive. At times I am unable to hear the television and I have had problems with people calling me on the telephone and asking me, "What is that noise?"

. . . Dust particles continue to cover my car and I'm sure my respiratory system as well, creating a significant health risk.

The only thing visible from my kitchen and bedroom windows is the mill, an extremely unattractive view. I am a very patient and tolerable—tolerant person. I had hoped to live here

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for many years. It is my opinion that Mr. and Mrs. Winslow will not be able to rent this property at all under these conditions.

Based upon the foregoing evidence, “[w]e agree that the detriment to the community outweighs any alleged benefit.” *Mahaffey*, 99 N.C. App. at 684, 394 S.E.2d at 208.

The final *Chrismon* factor is “the compatibility of the uses envisioned in the rezoned tract with the uses already present in adjacent tracts.” *Covington*, 108 N.C. App. at 240, 423 S.E.2d at 542. As our Supreme Court noted, “rezoning of a parcel in an old and well-established residential district to a commercial or industrial district would clearly be objectionable.” *Chrismon*, 322 N.C. at 631, 370 S.E.2d at 391. Here, the evidence demonstrates that the heavy industrial operations on MLC’s property are incompatible with the adjacent residential tracts as a result of, *inter alia*, the noise, air pollution, and truck traffic.

Based upon the foregoing analysis, we hold “that the rezoning was an illegal spot zoning and was, therefore, ‘in excess of the authority’ of the Board of Commissioners and invalid.” *Budd*, 116 N.C. App. at 178, 447 S.E.2d at 455 (quoting *Blades*, 280 N.C. at 551, 187 S.E.2d at 46). The trial court, therefore, correctly granted summary judgment to plaintiffs and denied summary judgment to defendant on this ground.

[3] Finally, plaintiffs contend that the trial court erred in denying their request for *mandamus*, in which they requested that the trial court order defendant to enforce the UDO as to MLC’s property as it existed when the UDO was adopted.³ We disagree.

“The writ of *mandamus* is an ancient and carefully circumscribed extraordinary remedy.” *Lloyd v. Babb*, 296 N.C. 416, 452, 251 S.E.2d 843, 866 (1979). As our Supreme Court has explained,

mandamus will lie to compel the performance of a purely ministerial duty imposed by law, and that the party seeking the writ

3. When a zoning action is invalidated on the basis of illegal spot zoning, “[t]he zoning classification of the property at issue reverts to the last legal classification” of the property as defined by the applicable zoning ordinance. *Budd*, 116 N.C. App. at 178, 447 S.E.2d at 455 (citing *Mahaffey*, 99 N.C. App. at 684, 394 S.E.2d at 208). Therefore, in the case *sub judice*, the zoning classification for the property at issue necessarily reverts to its classification prior to the illegal rezoning. *See id.* However, MLC’s operations on the property prior to the rezoning application constituted a legal non-conforming use, and therefore, plaintiffs petitioned for *mandamus* to have the UDO enforced against the property as it existed in 1987.

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must have a clear legal right to demand it, and the party sought to be coerced must be under legal obligation to perform the duty. “[The function of the writ] is to compel the performance of a ministerial duty—not to establish a legal right, but to enforce one which has been established.”

Hinshaw v. McIver, 244 N.C. 256, 259, 93 S.E.2d 90, 92 (1956) (alteration added) (quoting *St. George v. Hanson*, 239 N.C. 259, 263, 78 S.E.2d 885, 888 (1954)). Our Court has noted that *mandamus* may be appropriate when, as in the instant case, a party seeks to compel the enforcement of a zoning ordinance. *See, e.g., Midgett v. Pate*, 94 N.C. App. 498, 505, 380 S.E.2d 572, 576 (1989). However, *mandamus* is not appropriate and “the writ will not issue . . . where the rights of those not parties to the action would be injuriously affected.” *Hinshaw*, 244 N.C. at 259, 93 S.E.2d at 92; *accord Britt v. Bd. of Canvassers*, 172 N.C. 797, 805, 90 S.E. 1005, 1008 (1916).

Here, enforcement of the zoning ordinance would directly and detrimentally impact MLC’s ability to continue its current use of the property in question. Therefore, MLC’s rights would be injuriously affected by the granting of *mandamus*. Although MLC initially was a defendant in the case, the trial court noted that during the hearing on the cross motions for summary judgment, “[p]laintiffs announced to the court that they were taking a voluntary dismissal as to [MLC].” The basis for the dismissal is not evident from the record on appeal. On 19 September 2006, plaintiffs signed—and later submitted to the trial court—the “Notice of Voluntary Dismissal of Claims as Against Defendant McDowell Lumber Company, Inc.” Thereafter, on 28 September 2006, the trial court entered its order on the cross motions between plaintiffs and defendant.

The trial court properly denied plaintiffs’ request that *mandamus* be issued to compel defendant “to ‘roll back’ the enforcement of the zoning ordinance as to this property as it existed in 1987.” Although the trial court based its decision upon defendant’s good faith issuance of building permits to MLC and MLC’s good faith reliance upon those permits, it is well-settled that “[i]f the correct result has been reached, the judgment will not be disturbed even though the trial court may not have assigned the correct reason for the judgment entered.” *Wells v. N.C. Dep’t of Corr.*, 152 N.C. App. 307, 321, 567 S.E.2d 803, 813-14 (2002) (quoting *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989)). The trial court did not err in refusing to

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issue the extraordinary writ of *mandamus*, and accordingly, plaintiffs' assignment of error is overruled.

Affirmed.

Judges CALABRIA and GEER concur.

DELBERT CHRIS CHILDRESS, NORMA M. DAVIS, STEVE G. DAVIS, EDDIE ALLEN BRYANT, EUNICE B. MACEMORE, L. HERMAN BURCHAM, RUTH K. BURCHAM, DELMER SIMMONS, RONALD CHILDRESS, KENNETH VESTAL, AND PAUL BROWN, PLAINTIFFS v. YADKIN COUNTY; LEON CASSTEVENS, KIM CLARK PHILLIPS, ALLEN SNEED, D.C. SWAIM AND BRADY WOOTEN, MEMBERS OF THE BOARD OF COMMISSIONERS OF YADKIN COUNTY, JERRY L. BRYANT, DEFENDANTS

No. COA06-1467

(Filed 18 September 2007)

1. Zoning— spot zoning—reasonable basis—change from rural agriculture to restricted residential

The rezoning of fifty-one acres of defendant Bryant's property from rural agriculture to restricted residential was not illegal spot zoning, because: (1) although defendant's property meets the first two elements of spot zoning including that it is a small tract and it is surrounded by a larger uniformly zoned property, it does not meet the third element since the property has not been relieved from restrictions on lot size to which the rest of the area is subject, and single family homes are allowed in both zoning districts; (2) even if the board of commissioners engaged in spot zoning, it had a reasonable basis to do so based on the county's existing comprehensive plan to allow the development of residential subdivisions that are compatible to the rural parts of the county; (3) under existing zoning regulations, defendant could place manufactured homes on the property which would have the same effect on the surrounding tracts in terms of population density, water, and sewer concerns; (4) the restricted residential zoning classification will provide consistency in the development of the subdivision, and the community will benefit since the growth of the area will be regulated; (5) an increased number of people encourages more people to enter the county, which in turn creates more employment opportunities for the county's residents;

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(6) both zoning districts have the same minimum lot size of 30,000 square feet; and (7) the property is not being rezoned for a commercial or industrial purpose, but will maintain its status as a residential area.

2. Zoning— contract zoning—failure to show contract or bilateral obligation

The trial court did not err in a declaratory judgment action by granting summary judgment in favor of defendants on the issue of contract zoning, because: (1) plaintiffs concede they did not present direct evidence of a specific bargain between defendant board of commissioners and defendant landowner for the use of the rezoned property; and (2) plaintiffs have failed to produce any evidence of a contract or bilateral obligation between defendants.

3. Zoning— factual findings—reasonableness of rezoning

The trial court did not err in a declaratory judgment action by granting summary judgment in favor of defendants even though plaintiffs contend the zoning boards have an absolute obligation to make appropriate factual findings which clearly demonstrate the reasonableness of the rezoning determination, because: (1) contrary to plaintiffs' assertion, *Good Neighbors*, 355 N.C. 254 (2002), does not create an absolute obligation to make factual findings; (2) the minutes from the board meeting establish that the board considered the impact of rezoning defendant's property on the surrounding tract; (3) although a zoning board acting in a quasi-judicial capacity is required to make findings of fact, a rezoning decision is a legislative act; (4) although plaintiffs argue the trial court erred by not making findings as to whether the board adequately considered the relevant *Chrismon* factors, it is not a part of the function of the trial court to make findings of fact and conclusions of law on a motion for summary judgment; and (5) although plaintiffs contend it is highly significant that they prevailed on their motion for preliminary injunction, findings and conclusions made in the grant of an injunction are not authoritative as the law of the case for any other purpose, and the judgment or order is not res judicata on final hearings.

Appeal by plaintiffs from an order entered 28 June 2006 by Judge Catherine C. Eagles in Yadkin County Superior Court. Heard in the Court of Appeals 23 May 2007.

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Randolph and Fischer, by J. Clark Fischer; Melvin and Powell, by Edward L. Powell, for plaintiff-appellants.

Benjamin H. Harding, Jr., PLLC, by Benjamin H. Harding, Jr., for defendant-appellees Yadkin County, Leon Casstevens, Kim Clark Phillips, Allen Sneed, D.C. Swain, and Brady Wooten, Members of the Board of Commissioners of Yadkin County.

Vannoy, Colvard, Triplett & Vannoy, P.L.L.C., by Daniel S. Johnson, for defendant-appellee Jerry L. Bryant.

HUNTER, Judge.

Delbert Chris Childress, Norma M. Davis, Steve G. Davis, Eddie Allen Bryant, Eunice B. Macemore, L. Herman Burcham, Ruth K. Burcham, Delmer Simmons, Ronald Childress, Kenneth Vestal, and Paul Brown (“plaintiffs”) appeal the trial court’s entry of summary judgment in favor of Jerry Bryant (“Bryant”) and Yadkin County (“the County”).¹ This case involves the question of whether Yadkin County properly re-zoned Bryant’s property from rural agriculture to restricted residential. After careful consideration, we affirm.

On 29 December 2004, Bryant filed a petition to re-zone approximately fifty-one (51) acres of real property in Boonville Township, Yadkin County, from a zoning classification of rural agricultural to restricted residential. On 10 January 2005, the Yadkin County Planning Board met to consider Bryant’s petition to re-zone the subject property and recommended that the petition be denied.

After this hearing, notice of public hearing on this petition was published in the Yadkin Ripple newspaper and signage was posted on the property. On 21 February 2005, the Yadkin County Board of Commissioners (“the Board”) held a public hearing to take comments on Bryant’s petition for re-zoning. The Board granted Bryant’s re-zoning request by a three to two (3-2) vote.

On 24 March 2005, plaintiffs filed a complaint against defendants seeking a declaratory judgment that the amendment to the Yadkin County Zoning Ordinance approved by the Board constituted illegal spot zoning and/or illegal contract zoning. Yadkin County and individual members of the Board filed an answer denying the essential allegation of the complaint, and Bryant’s answer denied any impropriety in the amendment and counterclaimed on the grounds

1. Bryant and the County are also referred to as “defendants” in this opinion.

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that plaintiffs' complaint was wrongfully filed for the purpose of harassment.

On 19 April 2005, the trial court granted plaintiffs' motion for preliminary injunction and entered an order prohibiting Yadkin County and the Board from reclassifying the property and Bryant from using the property in a manner inconsistent with the rural agriculture designation. Defendants and plaintiffs then moved for summary judgment. The trial court granted defendants' motion for summary judgment and denied plaintiffs' summary judgment motion.

In support of their motion for summary judgment, Yadkin County and the Board submitted the affidavit of County Manager Cecil Wood ("Wood"). According to Wood, the minutes of the Board's meeting showed that "nine (9) people spoke in favor of the re-zoning petition, four (4) people spoke in opposition to the re-zoning petition and six (6) people spoke without directly indicating" their position on the issue. The Board then considered the Yadkin County Planning Board's recommendation that Bryant's petition be denied and requested that the Planning Board gather additional information regarding Bryant's petition to re-zone.

The Planning Board again recommended that Bryant's petition be denied. On 9 March 2005, the Board then held another hearing regarding Bryant's petition. Wood stated that at this meeting, "one (1) person spoke in favor of the re-zoning petition and three (3) people spoke in opposition to the re-zoning petition." The Board then voted in favor of the re-zoning.

Plaintiffs presented several affidavits in opposition to defendants' summary judgment motion and in support of their motion for summary judgment. One of the plaintiffs, Delbert Chris Childress ("Childress"), provided an affidavit stating that Bryant presented no evidence of the presence of adequate water and sewer systems for the subdivision that Bryant had proposed. Childress also alleged that the Board, in approving the re-zoning, never articulated any reason for disagreeing with the Planning Board's position against the re-zoning. Other affidavits presented by plaintiffs stated that the re-zoning was not in the best interest of the community, would fundamentally change the nature of the surrounding property, and would increase traffic in and around the re-zoned property.

Plaintiffs present the following issues for this Court's review: (1) whether the trial court erred in granting summary judgment in favor

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of defendants on the issue of illegal spot zoning; and (2) whether the trial court erred in granting summary judgment in favor of defendants on the issue of illegal contract zoning.

We review a trial court's grant of summary judgment *de novo*. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004). "Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [a] party is entitled to a judgment as a matter of law.'" *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c)). "Evidence presented by the parties is viewed in the light most favorable to the non-movant." *Id.*

Re-zoning is considered a legislative act. *Kerik v. Davidson Cty.*, 145 N.C. App. 222, 228, 551 S.E.2d 186, 190 (2001). Accordingly, zoning decisions are typically afforded great deference by reviewing courts and "[w]hen the most that can be said against such ordinances is that whether it was an unreasonable, arbitrary or unequal exercise of power is fairly debatable, the courts will not interfere[]" and in most circumstances, "will not substitute its judgment for that of the legislative body[.]" *In re Appeal of Parker*, 214 N.C. 51, 55, 197 S.E. 706, 709, *appeal dismissed*, 305 U.S. 568 (1938). It therefore follows that the burden of establishing that a zoning decision was invalid is generally on the party challenging such a decision. *Kinney v. Sutton*, 230 N.C. 404, 411, 53 S.E.2d 306, 310 (1949). In situations involving spot zoning, however, the zoning authority must establish a clear showing of a reasonable basis for the action. *Chrismon v. Guilford County*, 322 N.C. 611, 627, 370 S.E.2d 579, 589 (1988).

I.

[1] Plaintiffs argue that the trial court erred in determining that the re-zoning was not illegal spot zoning. We disagree.

Spot zoning has been defined as:

A zoning ordinance, or amendment, which singles out and reclassifies a relatively small tract owned by a single person and surrounded by a much larger area uniformly zoned, so as to impose upon the small tract greater restrictions than those imposed upon the larger area, or so as to relieve the small tract from restrictions to which the rest of the area is subjected, is called "spot zoning."

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Blades v. City of Raleigh, 280 N.C. 531, 549, 187 S.E.2d 35, 45 (1972). Spot zoning is not invalid *per se* in North Carolina so long as the zoning authority made “a clear showing of a reasonable basis for such distinction.” *Id.* If a zoning decision is not considered spot zoning then it is presumed valid. *Good Neighbors of S. Davidson v. Town of Denton*, 355 N.C. 254, 258 n.2, 559 S.E.2d 768, 771 n.2 (2002).

Plaintiffs make only a conclusory argument that spot zoning did occur and argue instead that the Board did not have a reasonable basis to engage in spot zoning. Before reaching the issue of whether the Board was reasonable, however, we must first determine whether spot zoning occurred in the instant case.

A.

In order to determine whether spot zoning has occurred a reviewing court looks to the following factors: (1) whether a relatively small tract has been re-zoned (2) that is surrounded by a much larger area uniformly zoned (3) which imposes on the small tract greater restrictions *or* relieves the small tract from those restrictions. We address each factor in turn.

As to whether the tract is a “small tract” defendants put forth only Wood’s legal conclusion that the property in question “would not meet the ‘small tract’ requirements of spot zoning.” Plaintiffs also state a legal conclusion that the property is a small tract. Thus, the parties’ affidavits and briefing on this issue are of little guidance. Our Supreme Court, however, has concluded that fifty (50) acres can be considered a “small tract” for purposes of determining whether spot zoning has occurred. *Good Neighbors of S. Davidson*, 355 N.C. at 259, 559 S.E.2d at 772. Thus, defendant Bryant’s property, being approximately the same size, meets the first element of spot zoning.

The next issue is whether the re-zoned tract is surrounded by a much larger uniform tract. Reading plaintiffs’ affidavits together they assert that defendant Bryant’s tract is “surrounded for several miles by a much larger area uniformly zoned [r]ural [a]griculture” property. Defendants argue that there are “sixty-seven areas [*sic*] of non-[r]ural [a]gricultural classification” within a three (3) mile radius of defendant Bryant’s property. That, however, does not necessarily address those tracts immediately surrounding the tract in question. A map included in the record reveals that the tracts immediately surrounding defendant Bryant’s tract are uniformly zoned as rural agricultural for most of the one mile radius around that property. Given our

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requirement to view the evidence in the light most favorable to the non-movant (in this case, plaintiffs), we conclude that the re-zoned tract is surrounded by a larger uniformly zoned property.

As defendant County states in their brief and defendant Bryant cites in his, the third element of spot zoning is found where the re-zoning “*impose[s] upon the small tract greater restrictions than those imposed upon the larger area, or so as to relieve the small tract from restrictions[.]*” *Blades*, 280 N.C. at 549, 187 S.E.2d at 45 (emphasis added). Under a literal interpretation of this rule, then, nearly any re-zoning action would satisfy the third element of spot zoning as it would almost certainly either remove or add restrictions to the property. We do not read *Blades* so literally.

In *Good Neighbors*, our Supreme Court found spot zoning where a fifty (50) acre tract, which the Court characterized as a small tract, “was: (1) owned by a single entity, (2) freed of restrictions imposed on neighboring landowners, and (3) surrounded by a uniformly zoned area[.]” *Good Neighbors of S. Davidson*, 355 N.C. at 259, 559 S.E.2d at 772. As we have already discussed, similar factors are present in the instant case which lend support to plaintiffs’ conclusion of spot zoning. Important to the finding of spot zoning in *Good Neighbors*, however, was that the land being re-zoned “was transformed from one of the most restrictive zoning classifications under the county ordinance (residential-agricultural) to one of the most expansive under the town’s ordinance (forty acres as heavy industrial and ten acres as light industrial).” *Id.* Such is not the case here.

Re-zoning an area as restricted residential provides far more protections to surrounding rural agricultural property than the heavy industry/light industry re-zoning in *Good Neighbors*. Here, the re-zoned property would be limited to medium density stick built and modular homes, and housing in this zoning district is allowed only where adequate water and sewer or septic systems are available. The restricted residential zoning would not allow for either light or heavy industry to take place on the property. Furthermore, under both the restricted residential and residential agricultural the minimum lot size for a residence is thirty thousand (30,000) square feet where no public water and sewer supply exits. Therefore, defendant Bryant’s property has not been relieved from restrictions on lot size to which the rest of the area is subject. Finally, single family homes are allowed in the rural agricultural zoning district as well as in the residential restricted zoning district. Given the similarities between the two zoning classifications, we cannot say that the third element of

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spot zoning has been met. Accordingly, the Board's decision is presumed valid, and plaintiffs have not overcome this presumption. Thus, the trial court had a valid basis to grant summary judgment on this ground.

B.

Additionally, we also hold that even if the Board did engage in spot zoning it had a reasonable basis to do so. Thus, the trial court's grant of summary judgment to defendants was proper on this ground as well. On this alternate ground we must address whether defendants can establish a clear showing of reasonable basis for the re-zoning decision. The following factors are relevant in that determination: (1) "the size of the tract in question"; (2) "the compatibility of the disputed zoning action with an existing comprehensive zoning plan"; (3) "the benefits and detriments resulting from the zoning action for the owner of the newly zoned property, his neighbors, and the surrounding community; and" (4) "the relationship between the uses envisioned under the new zoning and the uses currently present in adjacent tracts." *Chrismon*, 322 N.C. at 628, 370 S.E.2d at 589. With these factors in mind, "the criteria are flexible, and the specific analysis used depends on the facts and circumstances of a particular case." *Id.*

As to the first factor, the size of defendant Bryant's property is approximately fifty-one (51) acres. As stated, property of a similar size has been considered a "small tract." *Good Neighbors of S. Davidson*, 355 N.C. at 259, 559 S.E.2d at 772. Additionally, defendant Bryant's property is the only tract of land that has been re-zoned. Under *Good Neighbors*, the size of defendant Bryant's tract and the fact that his was the only piece of property re-zoned weighs against the reasonableness of the Board's decision. *Id.*

The second factor is whether the re-zoning was compatible with the County's existing comprehensive plan. Defendants submitted an affidavit of the County Manager, Wood, that the County "recogniz[ed] that the development of residential subdivisions [will be] an inevitable consequence of the transition of [the] County from a purely rural environment to a mixed use environment[.]" The problem, according to Wood, is that most of the land in the County is still classified as rural agricultural. Therefore, "[i]f no [r]ural [a]gricultural classified land could ever be re-zoned to a [r]esidential classification, then few, if any, new sub-divisions in excess of three (3) lots could ever be built in [the] County." Plaintiffs present no argument on this

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issue. We find that Wood's affidavit is well reasoned and reflects the likely transition of the County from a purely rural environment to a mixed use environment. Additionally, Article 6, Section 4 of the Zoning Ordinance recognizes this fact and states, "[i]n order to allow the development of residential subdivisions that are compatible to the rural parts of the County" the Board may re-zone lands classified as rural agricultural to one of the residential zoning classifications. We thus conclude that this re-zoning was compatible with the County's existing comprehensive plan and, thus, this factor weighs in favor of defendants.

The third factor, characterized as the "benefits versus detriments" test, has recently been used by our Supreme Court. The inquiry "is *expressly* limited to examining the ordinance's beneficial and detrimental effects on the property owner, his neighbors, and the surrounding community[]" and merely showing a lack of a detriment will not suffice. *Id.* at 259-60, 559 S.E.2d at 772 (emphasis added) (citing *Chrismon*, 322 N.C. at 628, 370 S.E.2d at 589); *cf.* *Chrismon*, 322 N.C. at 628, 370 S.E.2d at 589 ("[t]he possible 'factors' are numerous and flexible, and they exist to provide guidelines for a judicial balancing of interests"). The *Good Neighbors* Court relied on *Chrismon* to determine that a reviewing court's analysis would be limited to those three areas and concluded that any benefit to the town could not be considered. *Good Neighbors of S. Davidson*, 355 N.C. at 259, 559 S.E.2d at 772 (specifically holding that an increase in a town's tax base was not relevant).

The *Chrismon* Court, however, in addition to those items listed in *Good Neighbors*, also held that "it is important, in our view, to consider this in the added context of both the benefits of the rezoning for the surrounding community *and* for the public interest." *Chrismon*, 322 N.C. at 630, 370 S.E.2d at 590 (emphasis added). Indeed, the *Chrismon* Court held that "[t]he standard is not the advantage or detriment to particular neighboring landowners, but rather the effect upon the entire community as a social, economic and *political unit*." *Id.* at 629, 370 S.E.2d at 590 (emphasis added) (quoting *Mansfield & Swett, Inc. v. West Orange*, 120 N.J.L. 145, 150, 198 A. 225, 233 (1938)). To not consider the impact on the political unit, in this case the County, which is in charge of protecting the public good, would defeat the purpose of having local governments making such decisions. *See In re Appeal of Parker*, 214 N.C. at 55, 197 S.E. at 709 (noting in a re-zoning case that legislative bodies are "charged with the primary duty and responsibility of determining whether its action

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is in the interest of the public health, safety, morals, or general welfare”). Accordingly, as we review this case *de novo*, we look at all relevant facts and the impact they will have on the entirety of the County, not just the immediate area. *See Chrismon*, 322 N.C. at 628, 370 S.E.2d at 589 (the factors in determining whether a spot zoning is illegal “are flexible, and the specific analysis used depends on the facts and circumstances of a particular case”).

In the instant case, defendant Bryant concedes that the re-zoning would create a detriment for the neighbors inasmuch as population density and traffic would increase. Bryant, however, points out that traffic concerns would be the same whether Bryant built homes on the property or manufactured homes were placed on the property. Placing manufactured homes on the property is permissible according to a County summary of permitted uses for rural agriculture property. Specifically, the summary includes the following language:

Without rezoning, the owner may subdivide the property into up to three lots less than ten acres each, and subdivide the remainder into 10+ acre lots. Each of these lots may be deeded to a second unrelated party, and then subdivided again into up to three lots. This process can be repeated without rezoning, as long as the resulting lots are at least 30,000 square feet (0.69 acre) in area. County staff would have to approve this development without Planning Board review. Depending on acreage, ownership and residency, each lot may have up to three manufactured homes, without rezoning, and with no road requirements—only a 45-foot right-of-way easement. Conceivably, without rezoning, the Bryant property might be developed this way with 40-plus singlewide manufactured homes and no road specifications.

...

If the tract is rezoned to [r]esidential [r]estricted, a major subdivision of the property would be allowed with Planning Board approval, with lots 30,000 square feet or more. Only one dwelling per lot would be allowed. State requirements for roads would be in place; if subdivided into nine lots or more, all roads must be paved to state specifications. We estimate that the Bryant property could be developed under this zoning for 30 to 40 site-built or modular homes.

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As to plaintiffs' concerns regarding water and sewer, both types of housing would require water and sewer services. Some of this, however, merely establishes a lack of a detriment to the community.

The advantage in building homes for the community instead of placing forty (40) manufactured homes on Bryant's property (the number which the property could hold) is that placement of manufactured homes would come without road specifications and without Board involvement. Under the restricted residential classifications, however, the Board must approve the subdivision of the property, North Carolina road requirements would be in effect, and the building would be limited to stick-built and modular homes. Under rural agricultural zoning a number of different styles of homes could be placed on the property from stick-built and modular homes to Class A and Class B manufactured homes. Thus, the restricted residential zoning classification will provide consistency in the development of the subdivision.

Finally, Wood's affidavit recognizes the economic reality in the County inasmuch as there is uncertainty in the tobacco market along with a decline in the price of some agricultural products. Thus, farmers have looked for ways to put their lands previously used for agriculture to more productive uses. One of those uses is to subdivide the property and to sell those lots for the construction of single family homes. An increased number of people encourages more businesses to enter the County, which in turn creates more employment opportunities for the County's residents. In sum, this factor weighs in favor of defendants.

The fourth factor requires this Court to compare the relationship between uses anticipated under the new zoning with land use in adjacent tracts. The intent of the two zoning classifications follow:

[Rural Agriculture:] The purpose of this district is to maintain a rural development pattern where single-family housing is intermingled with agricultural uses, not having access to public water and sewer systems. This district is also designed to protect rural areas from the intrusion of non-agricultural land uses that could create a nuisance, detract from the quality of life and/or present a danger to the natural environment.

[Restricted Residential:] The purpose of this district is to stabilize established and planned residential neighborhoods by providing a place for medium density stick built and modular homes, provided that adequate water and sewer systems are available.

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It is settled that “rezoning of a parcel in an old and well-established residential district to a commercial or industrial district would clearly be objectionable[.]” *Chrismon*, 322 N.C. at 631, 370 S.E.2d at 591. This is not the case here. In the instant case, the use of the property to be re-zoned will become residential. The surrounding tracts of land also have a residential component, and under existing zoning regulations defendant Bryant could place manufactured homes on the property, which, as stated above, would have the same effect on the surrounding tracts in terms of population density, water, and sewer concerns.

Furthermore, both the rural agricultural zoning district and the restricted residential zoning district have the same minimum lot size of thirty thousand (30,000) square feet. Therefore, defendant Bryant’s property as re-zoned is restricted to the same lot size as existed prior to the re-zoning, and the property has not been relieved from restrictions on lot size to which the rest of the area is subjected. Accordingly, we find that this factor favors defendants.

Plaintiffs rely on *Good Neighbors* and *Budd v. Davie County*, 116 N.C. App. 168, 447 S.E.2d 449 (1994), in support of their argument that the re-zoning in the instant case is a fundamental departure from the zoning in adjacent tracts. We find those cases distinguishable from the instant one. In *Budd*, this Court reviewed a trial court’s grant of summary judgment for the defendant county and board of commissioners in a spot zoning case. *Budd*, 116 N.C. App. at 169-70, 447 S.E.2d at 450. In that case, the board had re-zoned the property from rural agricultural to industrial while the surrounding tracts remained rural agricultural. *Id.* at 175, 447 S.E.2d at 453. The envisioned use was sand dredging, which we held to be inconsistent and objectionable with the residential and agricultural use of the surrounding tracts. *Id.* at 177-78, 447 S.E.2d at 455. We fail to see how *Budd* controls this case. Here, the property is not being re-zoned for a commercial or industrial purpose but will maintain its status as a residential area. We similarly do not find *Good Neighbors* persuasive on this issue because it too dealt with a re-zoning from primarily rural uses to industrial uses. *Good Neighbors of S. Davidson*, 355 N.C. at 260-61, 559 S.E.2d at 773.

In summary, then, most of the individual factors deemed relevant to a spot zoning inquiry under *Chrismon* favor defendants. Specifically, we find that: (1) the re-zoning will benefit the community by allowing the growth of the area to be regulated; (2) Bryant’s re-

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zoned property is compatible with the County's comprehensive plan for the area; and (3) a tract of land zoned as restricted residential is compatible with the surrounding tracts. We find further support for our decision in that the re-zoning is to restricted residential from rural residential, which does not represent the drastic change from rural residential to heavy/light industry found in *Good Neighbors*. Thus, we hold that the Board and the County had a reasonable basis to re-zone the property and did not engage in illegal spot zoning. Plaintiffs' assignments of error as to this issue are rejected.

II.

[2] Plaintiffs next argue that the trial court erred in granting summary judgment to defendants on the issue of contract zoning. We disagree.

Illegal contract zoning is "a transaction wherein both the landowner who is seeking a certain zoning action and the zoning authority itself undertake reciprocal obligations in the context of a *bilateral* contract." *Chrismon*, 322 N.C. at 635, 370 S.E.2d at 593. Contract zoning is illegal in North Carolina "because it represents an abandonment on the part of the zoning authority of its duty to exercise independent judgment in making zoning decisions." *Id.*

Plaintiffs concede that they did not present direct evidence of a specific bargain between defendants for the use of the re-zoned property. Plaintiffs argue instead that defendant Bryant, by testifying in detail before the Board about the use of the property, and by the Board's vote to re-zone the property, created a contract between him and the Board. Plaintiffs make strenuous arguments in their brief that the Board acted without any reasonable basis or information before they made their decision to re-zone but now argue that the Board had so much information that a contract must have formed. We simply fail to see how both can be true. Because plaintiffs have failed to produce any evidence of a contract or bilateral obligation between defendants, we reject plaintiffs' arguments as to this issue.

III.

[3] We address plaintiffs' additional arguments in this section. Plaintiffs argue that zoning boards have "an absolute obligation to make appropriate factual findings which clearly demonstrate the reasonableness of the rezoning determination[.]" We disagree.

Plaintiffs rely on *Good Neighbors*. In that case, our Supreme Court stated that there is "no evidence showing that the town's zon-

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ing authority considered the relationship between the envisioned uses of the property and the uses present in the adjacent tracts[.]” *Good Neighbors of S. Davidson*, 355 N.C. at 262, 559 S.E.2d at 774. We do not read such language as creating an “absolute obligation” to make factual findings. At best, this could be read as requiring that zoning boards consider evidence related to envisioned use of the property compared with the use of the surrounding tracts. In the instant case, the minutes from the board meeting clearly establish that the Board considered the impact of re-zoning defendant Bryant’s property on the surrounding tract.

When a zoning board is acting in a quasi-judicial capacity, however, it is required to make findings of fact. *See Devaney v. City of Burlington*, 143 N.C. App. 334, 337-38, 545 S.E.2d 763, 765 (2001) (a city council’s denial of requests by a plaintiff for Manufactured Home Overlay District zoning is quasi-judicial because it involves the application of set policies to an individual situation and requires findings of fact). Such is not the case here. As we stated above, a re-zoning decision is a legislative act. *Kerik*, 145 N.C. App. at 228, 551 S.E.2d at 190.

Plaintiffs also argue that the trial court erred by not making findings as to whether the Board adequately considered the relevant *Chrismon* factors. We disagree. “[I]t is not a part of the function of the [trial] court on a motion for summary judgment to make findings of fact and conclusions of law.” *Capps v. City of Raleigh*, 35 N.C. App 290, 292, 241 S.E.2d 527, 528 (1978). Plaintiffs’ argument as to this issue is rejected.

Plaintiffs’ final argument is that it is “highly significant” that plaintiffs prevailed on their motion for preliminary injunction. Defendant County correctly points out, however, that findings and conclusions made in the grant of an injunction are “ ‘not authoritative as “ ‘the law of the case’ ” for any other purpose, and the judgment or order [is] not *res adjudicata* on’ ” final hearings. *Schloss v. Jamison*, 258 N.C. 271, 276, 128 S.E.2d 590, 594 (1962) (quoting *Patterson v. Hosier Mills*, 214 N.C. 806, 810, 200 S.E. 906, 908 (1939)). Plaintiffs’ argument as to this issue is also rejected.

IV.

In summary, we conclude that the Board did not engage in spot zoning when it re-zoned defendant Bryant’s property. Additionally, we find that even if spot zoning did occur, it was not illegal spot zoning.

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We also conclude that defendants did not engage in contract zoning. Finally, plaintiffs' remaining arguments are rejected and thus we affirm the trial court's grant of summary judgment to defendants.

Affirmed.

Judges ELMORE and GEER concur.

LAMAR OCI SOUTH CORPORATION, D/B/A LAMAR ADVERTISING OF ASHEVILLE, PETITIONER
v. STANLY COUNTY ZONING BOARD OF ADJUSTMENT AND STANLY COUNTY,
RESPONDENTS

No. COA06-993

(Filed 18 September 2007)

1. Zoning— outdoor advertising billboard—county ordinance preempted by State law

The superior court erred by concluding that a county's zoning ordinance prohibiting the relocation of the pertinent billboard was not preempted by State law regulating outdoor advertising, because: (1) although the North Carolina Outdoor Advertising Control Act (OACA) and its corresponding regulations do not preempt local regulation of outdoor advertising under N.C.G.S. § 160A-174(b)(5), N.C.G.S. § 160A-174(b)(2) provides that Department of Transportation (DOT) regulations preempt the county's zoning ordinance; (2) OACA and DOT's regulations allow a permit holder to move a nonconforming sign within the bounds of the sign location/site as defined by 19A N.C.A.C. 2E.0201(27) while in contrast Article IV Section 406.4(G) of the county's zoning ordinance provides that a nonconforming sign shall not be moved or replaced except to bring the sign into complete conformity with the county's ordinance; (3) the county ordinance makes unlawful an act, omission, or condition expressly made lawful by State law; (4) petitioner was not required to apply for a new permit from the county when at all times it had a valid DOT permit, and a permit issued by DOT shall be valid until revoked for nonconformance with the OACA or rules adopted by DOT; and (5) the county's denial of a permit to petitioner would in effect cause the billboard to be removed, which could not be done without the payment of just compensation.

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2. Appeal and Error— superior court—motion to supplement record—affidavits

The superior court did not err by denying respondents' motion to supplement the record before the superior court with the affidavits of the Planning Director and Zoning Administrator for the County, and two people who did not testify before the board, because the affidavits were not before the board.

Judge McGEE concurring in part and dissenting in part.

Appeal by Petitioner from order entered 19 April 2006 and by Respondents from order entered 28 April 2006 by Judge Mark E. Klass in Stanly County Superior Court. Heard in the Court of Appeals 10 April 2007.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Craig D. Justus, for Petitioner.

Hamilton Moon Stephens Steele & Martin, PLLC, by Robert C. Stephens and Mark R. Kutny; The Law Office of Joshua J. Morton, by Joshua J. Morton, Jr., for Respondents.

STEPHENS, Judge.

Lamar OCI South Corporation, d/b/a Lamar Advertising of Asheville ("Lamar"), appeals from an order of the Superior Court affirming a decision of the Stanly County Board of Adjustment ("the Board"). The Board and Stanly County (collectively "Respondents") appeal from an order of the Superior Court denying Respondents' motion to supplement the record before the Superior Court.

Lamar is an outdoor advertising company that leases a parcel of real estate in Stanly County, located along N.C. Highway 24/27, for an outdoor advertising sign ("the billboard"). The relevant parcel of real estate is zoned Highway Business ("HB"). The billboard was constructed in 1997, at which time Stanly County ("the County") and the Department of Transportation ("DOT") issued permits for the billboard. At that time, the County's zoning ordinance permitted outdoor advertising signs in HB zoning districts. In 2001, the County amended its zoning ordinance. As amended, the zoning ordinance prohibited outdoor advertising signs in HB zoning districts. Because it was located in an area in which outdoor advertising signs were prohibited by the amended ordinance, the billboard acquired

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the status of a legal nonconforming sign under a grandfathering provision of the zoning ordinance.

Bobby Soule, Lamar's Vice-President and General Manager, testified before the Board that DOT notified Lamar in early 2004 that DOT planned to widen N.C. Highway 24/27, that the billboard was located in the right-of-way of the proposed road widening, and that DOT would require the billboard to be relocated. Accordingly, Lamar relocated the billboard approximately fifty feet back from N.C. Highway 24/27. When Lamar relocated the billboard, it replaced the four poles of the billboard with four new poles. Otherwise, the billboard remained the same. Lamar did not inform the County of the relocation or request any permit from the County. DOT reimbursed Lamar for the costs of relocating the billboard.

Lamar received a letter dated 19 August 2004 from the County's zoning enforcement officer stating that Lamar's relocation of the billboard violated the County's zoning ordinance. Lamar contacted Ritchie Hearne ("Hearne"), a DOT district engineer, about the status of Lamar's DOT permit. In a letter dated 23 August 2004, Hearne stated that DOT regulations permitted a

sign owner to relocate [a] sign from its original location off new right of way as long as it remains in the "sign location/site" as defined by [DOT's] regulations. The subject sign met [DOT's] criteria and will keep the same application, milepost and permit numbers.

In a letter dated 30 August 2004, Lamar's attorney responded to the County, stating Lamar's position that the County could not prevent Lamar from taking any action authorized by DOT under DOT's sign regulatory program. Lamar also indicated it was willing to submit a permit application and fee to the County. Michael Sandy ("Sandy"), Planning Director and Zoning Administrator for the County, responded to Lamar by letter dated 28 February 2005. The letter informed Lamar that the billboard violated the County's zoning ordinance. Lamar timely appealed the decision to the Board.

The Board heard Lamar's appeal on 12 April 2005. Sandy testified that the County cited Lamar for failing to obtain a permit to erect a sign at the location where the billboard presently stood. He also stated that had Lamar submitted a permit application, the County would not have granted a permit since the zoning ordinance no longer allowed outdoor advertising in HB zoning districts.

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Hearne also testified at the hearing. He stated that, at the time of the hearing, Lamar had a valid permit for the billboard from DOT. He also testified that DOT regulations allowed a permit holder, without DOT's permission or knowledge, to move a sign "back" from a right-of-way as long as the sign was not moved more than 1/100th of a mile parallel to the right-of-way. If a sign did not conform to DOT regulations, then DOT would not allow the sign to be relocated, although DOT would be required to compensate the sign owner.

The Board unanimously affirmed Sandy's zoning decision. The Board concluded that when Lamar relocated the billboard, it lost its status as a legal nonconforming sign under the County's zoning ordinance because of the restriction of signs in areas zoned HB.

Lamar filed a petition for writ of certiorari in Superior Court on 12 May 2005, and an amended petition on 5 July 2005. Lamar contended that its relocation of the billboard was expressly authorized by DOT and, pursuant to N.C. Gen. Stat. §§ 160A-174(b)(2) and (5), Respondents were preempted from enforcing any ordinances that prohibited relocation of the billboard within DOT regulations. Lamar also contended that (1) the Board had committed errors of law; (2) the record did not contain substantial, competent, and material evidence to support the Board's decision; and (3) the Board's decision was not based upon substantial, competent, and material evidence and was arbitrary and capricious. Respondents filed an answer to the petition on 5 August 2005. The Superior Court allowed the writ of certiorari on 2 February 2006, finding that Lamar was entitled to a review of the Board's decision. The writ also required the County to certify the record of the proceedings to the Superior Court within sixty days.

Respondents filed a motion to supplement the record on 30 March 2006. Respondents sought to include in the record sworn affidavits by (1) Sandy; (2) the Outdoor Advertising Representative for DOT, Terry Morgan; and (3) the Right-of-Way Agent for DOT, Charles D. Napier. Lamar filed objections to Respondents' motion, contending (1) that Respondents were improperly attempting to introduce evidence that was not part of the record before the Board; (2) that if the motion was allowed, Lamar would be unable to cross-examine the witnesses contrary to its right of cross-examination in a quasi-judicial hearing; and (3) that Sandy's affidavits improperly raised zoning violations which were not part of the Board's decision.

The Superior Court heard arguments on Lamar's appeal and Respondents' motion on 10 April 2006. In an order entered 19 April

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2006, the Superior Court found that when Lamar relocated the billboard without the involvement of the County, the billboard became a newly erected and illegal sign which violated the County's zoning ordinance. The Superior Court concluded that Lamar was required to comply with the County's zoning ordinance when the billboard was relocated and that Lamar had not done so. The Superior Court also concluded that the County was not preempted from regulating outdoor advertising signs because (1) the County's zoning ordinance did not purport to regulate a field for which State law provided a complete and integrated regulatory scheme to the exclusion of local regulation; and (2) the County's zoning ordinance did not make unlawful an act, omission, or condition which was expressly made lawful by State law. The Superior Court further concluded that the Board did not commit any errors of law, that there was competent, material, and substantial evidence to support the Board's decision, and that the Board's decision was not arbitrary or capricious. Lamar appeals this order.

In a separate order entered 28 April 2006, the Superior Court denied Respondents' motion to supplement the record, concluding that Respondents sought to supplement the record with evidence that would inappropriately add to the evidence that was before the Board. Respondents appeal this order.

I. Lamar's Appeal

Lamar brings before this Court two main arguments: (1) the Superior Court erred by concluding that the County's regulations were not preempted by State law regulating outdoor advertising; and (2) the Superior Court erred by concluding that the Board's decision was supported by competent evidence and was not arbitrary and capricious.

"When the Superior Court grants certiorari to review a decision of [a] Board, it functions as an appellate court rather than a trier of fact." *Hopkins v. Nash County*, 149 N.C. App. 446, 447, 560 S.E.2d 592, 593-94 (2002). The Superior Court must

(1) review the record for errors of law; (2) ensure that procedures specified by law in both statute and ordinance are followed; (3) ensure that appropriate due process rights of the petitioner are protected, including the right to offer evidence, cross-examine witnesses, and inspect documents; (4) ensure that the decision is supported by competent, material, and substantial evidence in

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the whole record; and (5) ensure that the decision is not arbitrary and capricious.

Whiteco Outdoor Adver. v. Johnston County Bd. of Adjust., 132 N.C. App. 465, 468, 513 S.E.2d 70, 73 (1999). When reviewing a Superior Court's decision, "this Court must determine: 1) whether the [superior] court used the correct standard of review; and, if so, 2) whether it properly applied this standard." *Hopkins*, 149 N.C. App. at 447, 560 S.E.2d at 593. If a petitioner asserts that a board committed an error of law, the Superior Court must apply a *de novo* standard of review. *Hopkins*, 149 N.C. App. 446, 560 S.E.2d 592. If a petitioner asserts that a board's decision was not supported by the evidence, or was arbitrary and capricious, then the Superior Court must apply the whole record standard of review. *Id.*

A. Preemption

[1] Lamar argues that the County's zoning ordinance prohibiting the relocation of the billboard is preempted by the North Carolina Outdoor Advertising Control Act ("OACA"), N.C. Gen. Stat. § 136-126 *et seq.*, and corresponding DOT regulations. Specifically, Lamar argues that the zoning ordinance purports to regulate a field for which State law provides a complete and integrated regulatory scheme to the exclusion of local regulation and that the County's zoning ordinance makes unlawful an act, omission, or condition which is expressly made lawful by State law. Because Lamar alleges an error of law, we conclude the Superior Court correctly applied a *de novo* standard of review. We now review whether the Superior Court did so properly.

Where a local ordinance conflicts with State law, the ordinance must yield. *In re Application of Melkonian*, 85 N.C. App. 351, 355 S.E.2d 503, *disc. review denied*, 320 N.C. 631, 360 S.E.2d 91 (1987). N.C. Gen. Stat. § 160A-174(b) (2005) provides, in part, that a local ordinance conflicts with State law when:

(2) The ordinance makes unlawful an act, omission or condition which is expressly made lawful by State or federal law; [or]

....

(5) The ordinance purports to regulate a field for which a State or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation[.]

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Lamar contends that the County's zoning ordinance is preempted under N.C. Gen. Stat. § 160A-174(b)(5). We disagree. In *Lamar Outdoor Adver., Inc. v. City of Hendersonville Zoning Bd. of Adjust.*, 155 N.C. App. 516, 573 S.E.2d 637 (2002), this Court examined the legislative intent of the OACA and concluded that "the OACA does not preempt local regulation of outdoor advertising." *Id.* at 521, 573 S.E.2d at 642. We rejected the conclusion that when enacting the OACA, "the General Assembly expressed an intention to regulate outdoor advertising only on a statewide basis, or to preclude local entities from regulating in this area." *Id.* at 520, 573 S.E.2d at 641. In *Morris Communications Corp. v. Bd. of Adjust. for City of Gastonia*, 159 N.C. App. 598, 583 S.E.2d 419, *appeal dismissed*, 357 N.C. 658, 590 S.E.2d 269 (2003), *reh'g denied*, 358 N.C. 155, 592 S.E.2d 690 (2004), we cited *Lamar* and again rejected the argument that the OACA was a "complete and integrated regulatory scheme" pursuant to N.C. Gen. Stat. § 160A-174(b)(5). *Id.* at 604, 583 S.E.2d at 423. We conclude that these cases control determination of this issue in the present case and dictate the conclusion that the OACA and its corresponding regulations do not preempt local regulation of outdoor advertising under N.C. Gen. Stat. § 160A-174(b)(5).

Lamar also contends that DOT's outdoor advertising regulations expressly authorize the relocation of a billboard within certain limitations, and that the County's zoning ordinance makes such action unlawful. Therefore, according to Lamar, N.C. Gen. Stat. § 160A-174(b)(2) provides that the DOT regulations preempt the County's zoning ordinance. We agree.

The General Assembly enacted the OACA "to provide and declare herein a public policy and statutory basis for the regulation and control of outdoor advertising." N.C. Gen. Stat. § 136-127 (2005). "The OACA delegates to [DOT] authority to further promulgate rules and regulations governing erection and maintenance of billboards, permitting procedures, appeal procedures related to administrative decisions denying or revoking a permit, and administrative procedures for appealing a decision that a billboard is illegal." *Capital Outdoor, Inc. v. Tolson*, 159 N.C. App. 55, 57, 582 S.E.2d 717, 719, *disc. review denied*, 357 N.C. 504, 587 S.E.2d 662 (2003).

DOT's regulations enacted pursuant to the OACA define a "Nonconforming Sign" as:

A sign which was lawfully erected but which does not comply with the provisions of State law or rules passed at a later date or

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which later fails to comply with State law or rules due to changed conditions. . . .

19A N.C.A.C. 2E.0200(16) (June 2004). The OACA defines “State law” as “a State constitutional provision or statute, or an ordinance, rule or regulation enacted or adopted by a State agency or political subdivision of a State pursuant to a State Constitution or statute.” N.C. Gen. Stat. § 136-129(6) (2005). As “[c]ounties are instrumentalities and agencies of the State government[,]” *High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 654, 142 S.E.2d 697, 701 (1965), the billboard became a nonconforming sign within the meaning of DOT’s regulations when the County amended its zoning ordinance preventing signs from being erected in areas zoned HB.

DOT’s regulations provide that “[a] nonconforming sign . . . may continue as long as it is not abandoned, destroyed, discontinued, or significantly damaged.” 19A N.C.A.C. 2E.0225(e) (June 2004). The regulations also provide that a “Sign Location/Site” “shall be measured to the closest 1/100th of a mile, in conformance with [DOT] methods of measurement for all state roads.” 19A N.C.A.C. 2E.0201(27) (June 2004). We therefore read 19A N.C.A.C. 2E.0225(e) to mean that “a nonconforming sign . . . may continue [at a Sign Location/Site] as long as it is not abandoned, destroyed, discontinued, or significantly damaged.” Such a reading is bolstered by 19A N.C.A.C. 2E.0210 which sets forth the grounds for revocation of a permit. Pursuant to that regulation,

[t]he [DOT] district engineer shall revoke a permit for a lawful outdoor advertising structure based on any of the following:

. . . .

(16) moving or relocating a nonconforming sign . . . which changes the location of the sign *as determined by Rule .0201(27)* of this Section[.]

19A N.C.A.C. 2E.0210 (June 2004) (emphasis added). We interpret the revocation regulation to mean that DOT can only revoke a permit for a nonconforming sign on the ground that the sign was moved or relocated if the sign is moved or relocated *outside the sign location/site*. Accordingly, the OACA and DOT’s regulations promulgated thereunder allow a permit holder to move a nonconforming sign within the bounds of the “Sign Location/Site” as defined by 19A N.C.A.C. 2E.0201(27).

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Conversely, Article IV Section 406.4(G) of Stanly County's zoning ordinance provides that "[a] nonconforming sign . . . shall not be moved or replaced except to bring the sign into complete conformity with [the County's ordinance]." This provision is in conflict with DOT's regulations, and we analyze the conflict as we did under similar circumstances in *Morris*, 159 N.C. App. 598, 583 S.E.2d 419. The local ordinance in effect in *Morris* provided:

(c) A nonconforming sign may not be moved or sign structure replaced except to bring the sign into complete conformity with this chapter. Once a nonconforming sign is removed (i.e., the removal of the structural appurtenances above the base or footing) from the premises or otherwise taken down or moved, said sign only may be replaced or placed back into use with a sign which is in conformance with the terms of this chapter.

(d) Minor repairs and maintenance of nonconforming signs necessary to keep a nonconforming sign in sound condition are permitted.

Id. at 602, 583 S.E.2d at 422. The relevant DOT regulation provided:

(c) Alteration to a nonconforming sign . . . is prohibited. Reasonable repair and maintenance are permitted including changing the advertising message or copy. The following activities are considered to be reasonable repair and maintenance:

- (1) Change of advertising message or copy on the sign face.
- (2) Replacement of border and trim.
- (3) Repair and replacement of a structural member, including a pole, stringer, or panel, with like material.
- (4) Alterations of the dimensions of painted bulletins incidental to copy change.

Id. at 604, 583 S.E.2d at 423. On appeal to this Court, we concluded that the DOT regulation expressly permitted repair and replacement of a billboard's structural member, and therefore, the ordinance was preempted to the extent that it conflicted with the DOT regulation. *Morris* is indistinguishable from the case at bar.

The Stanly County ordinance at issue in this case makes unlawful an act, omission, or condition expressly made lawful by State law and is preempted. The Superior Court erred in concluding otherwise. Lamar was not required to apply for a new permit from the County. In

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reaching this determination, we note that at all times Lamar had a valid DOT permit and that a permit issued by DOT “shall be valid until revoked for nonconformance with [the OACA] or rules adopted by the [DOT].” N.C. Gen. Stat. § 136-133(a) (2005). Furthermore, we note that the County’s denial of a permit to Lamar would in effect cause the billboard to be removed. This the County cannot do “without the payment of just compensation[.]” N.C. Gen. Stat. § 136-131.1 (2005).

Because we conclude that the County’s ordinance is preempted by State law, we need not reach Lamar’s contention that the Board’s decision was not supported by competent evidence and was arbitrary as a matter of law.

II. Respondent’s Appeal

[2] Respondents contend that the Superior Court erred in denying their motion to supplement the record before that court with the affidavits of Sandy and two people who did not testify before the Board. We disagree.

A superior court reviewing a decision of a board of adjustment “sits in the posture of an appellate court” and “does not review the sufficiency of evidence presented to it but reviews *that evidence presented to the town board.*” *Mann Media, Inc. v. Randolph County Planning Bd.*, 356 N.C. 1, 12, 565 S.E.2d 9, 17 (2002) (quoting *Coastal Ready-Mix Concrete Co. v. Board of Comm’rs of Nags Head*, 299 N.C. 620, 626-27, 265 S.E.2d 379, 383, *reh’g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980)) (emphasis added).

The affidavits with which Respondents attempted to supplement the record before the Superior Court were not before the Board. As such, the trial court did not err in denying Respondents’ motion to supplement the record before the Superior Court.

AFFIRMED IN PART, REVERSED IN PART.

Judge HUNTER concurs.

Judge McGEE concurs in part and dissents in part by separate opinion.

McGEE, Judge, concurring in part and dissenting in part.

I concur with the majority’s conclusion that local regulation of outdoor advertising is not preempted under N.C. Gen. Stat.

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§ 160A-174(b)(5). However, I do not agree with the majority's conclusion that the County's zoning ordinance is preempted pursuant to N.C. Gen. Stat. § 160A-174(b)(2). Therefore, I respectfully dissent from that portion of the majority's opinion and vote to affirm the Superior Court's order concluding that the County's zoning ordinance is not preempted.

The majority holds that the OACA and the corresponding DOT regulations expressly allow a permit holder to relocate a nonconforming billboard within a Sign Location/Site, but the County's zoning ordinance prohibits such action. The majority therefore concludes that the County's zoning ordinance is preempted pursuant to N.C.G.S. § 160A-174(b)(2). The majority also finds this Court's decision in *Morris Communications Corp. v. Board of Adjust. of Gastonia*, 159 N.C. App. 598, 583 S.E.2d 419 (2003), *reh'g denied*, 358 N.C. 155, 592 S.E.2d 690 (2004) to require that we find the County's zoning ordinance is preempted. I do not agree.

In *Morris*, the City of Gastonia required the petitioner to apply for a permit to change the frame and advertising sign on a billboard. *Id.* at 599, 583 S.E.2d at 420. When the petitioner applied for the permit, the City denied the application. *Id.* The petitioner appealed the decision, arguing that changing the frame and the advertisement on the billboard was expressly permitted by State law. *Id.* The Board of Adjustment upheld the denial of the permit, but the Superior Court reversed, concluding, *inter alia*, that State law preempted the city's ordinance. *Id.* The city ordinance in effect in *Morris* provided:

(c) A nonconforming sign may not be moved or sign structure replaced except to bring the sign into complete conformity with this chapter. Once a nonconforming sign is removed (i.e., the removal of the structural appurtenances above the base or footing) from the premises or otherwise taken down or moved, said sign only may be replaced or placed back into use with a sign which is in conformance with the terms of this chapter.

(d) Minor repairs and maintenance of nonconforming signs necessary to keep a nonconforming sign in sound condition are permitted.

Id. at 602, 583 S.E.2d at 422. The relevant DOT regulation provided:

(c) Alteration to a nonconforming sign . . . is prohibited. Reasonable repair and maintenance are permitted including

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changing the advertising message or copy. The following activities are considered to be reasonable repair and maintenance:

- (1) Change of advertising message or copy on the sign face.
- (2) Replacement of border and trim.
- (3) Repair and replacement of a structural member, including a pole, stringer, or panel, with like material.
- (4) Alterations of the dimensions of painted bulletins incidental to copy change.

Id. at 604, 583 S.E.2d at 423. As the majority recognizes in the present case, we concluded in *Morris* that the DOT regulation expressly permitted repair and replacement of a billboard's structural member. Therefore, the ordinance was preempted to the extent that it conflicted with the DOT regulation. *Id.* at 605, 583 S.E.2d at 423-24. Further, we also concluded in *Morris* that N.C. Gen. Stat. § 136-131.1 did not apply because the City of Gastonia did not remove the sign or cause the sign to be removed. *Id.* at 605, 583 S.E.2d at 424.

In the present case, I draw the same conclusion as to N.C.G.S. § 136-131.1. Respondents did not remove the sign or cause the sign to be removed. Indeed, the County was not even aware of the change in the billboard's location until after Lamar had relocated the billboard. Further, even if N.C.G.S. § 136-131.1 does apply to the present case, it does not prohibit local governments from removing signs, or causing signs to be removed, but prohibits local governments from doing so "without the payment of just compensation[.]" Therefore, this provision does not provide a basis for finding that the County's zoning ordinance is preempted.

I also conclude that the definitions included in 19A N.C.A.C. 2E.0201 and the grounds for revocation contained in 19A N.C.A.C. 2E.0210 relied upon by Lamar do not expressly make lawful an act made unlawful by the County's zoning ordinance. Although Lamar insists, and the majority agrees, that *Morris* requires us to conclude that the County's zoning ordinance is preempted, I find the DOT regulations applicable in the present case to be different from the DOT regulation at issue in *Morris*, and I distinguish *Morris* on that ground. Two of the provisions relied upon by Lamar are contained in the definition section of the regulations, and the third lists situations in which DOT can revoke a permit. Furthermore, although the majority correctly states that DOT's regulations provide that "[a] nonconform-

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ing sign . . . may continue as long as it is not abandoned, destroyed, discontinued, or significantly damaged[,]" this provision does not mention relocation of a billboard. In contrast, the regulation at issue in *Morris* was a substantive statement of prohibited and permissible actions regarding nonconforming signs and expressly stated that "[r]easonable repair and maintenance [of a nonconforming billboard] are permitted including changing the advertising message or copy." *Morris*, 159 N.C. App. at 604, 583 S.E.2d at 423 (quoting 19A N.C.A.C. 2E.0225(c)). I conclude that the DOT regulations relied upon by Lamar and the majority in the present case do not expressly make lawful the relocation of a nonconforming sign within the "Sign Location/Site" in violation of local zoning ordinances. Therefore, I would affirm the Superior Court's conclusion that the County's zoning ordinance is not preempted by the OACA or DOT's corresponding regulations pursuant to N.C.G.S. § 160A-174(b)(2).

Lamar also briefly argues that the Board's decision was not supported by competent evidence and was arbitrary as a matter of law. When reviewing a claim that a board's decision was not supported by the evidence, or was arbitrary and capricious, the Superior Court must apply the whole record standard of review. *Hopkins v. Nash County*, 149 N.C. App. 446, 448, 560 S.E.2d 592, 594 (2002). "The 'whole record' test requires the reviewing court to examine all competent evidence (the 'whole record') in order to determine whether the agency decision is supported by 'substantial evidence.'" *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994). "The 'whole record' test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*." *Thompson v. Board of Education*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977).

Lamar argues that the Board's findings of fact were based upon a misapprehension of law regarding the preemption issue and, therefore, are not binding on appeal and should not be upheld. Because I conclude that the Superior Court did not err by upholding the Board's decision, I reject this argument.

Finally, because I would affirm the Superior Court's order from which Lamar appeals, I do not reach Respondent's assignments of error.

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STATE OF NORTH CAROLINA, PLAINTIFF v. JERRY DALE SMITH, DEFENDANT

No. COA06-1321

(Filed 18 September 2007)

1. Assault— deadly weapon on government official—hands and water—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of assault with a deadly weapon on a government official based on defendant using his hands to submerge a deputy's head, chest, and abdomen in a river and to hold him there, even though defendant contends hands and water are not a deadly weapon as a matter of law, because: (1) the deadly character of a weapon depends more upon the manner of its use and the condition of the person assaulted rather than the intrinsic character of the weapon itself; (2) the State presented substantial evidence from which a reasonable juror could find that the manner in which defendant used his hands in conjunction with water was likely to cause death or serious bodily harm to the deputy, including evidence that defendant pushed the deputy into the water, forcibly held his head under the water, and pushed him back under the water after he managed to get a breath; and (3) the State was not required to show that the deputy was significantly smaller or weaker than defendant, or that the deputy was injured or otherwise incapacitated when defendant assaulted him, since defendant did not assault the deputy with his hands alone but instead used his hands to bring the deputy to an instrument of the assault.

2. Assault— deadly weapon on government official—lesser-included offense—misdemeanor assault on government official

The trial court in a prosecution for felony assault with a deadly weapon on a government official erred by refusing to submit to the jury the lesser-included offense of misdemeanor assault on a government official, because: (1) a defendant is entitled to have all lesser degrees of offenses supported by the evidence submitted to the jury as possible alternative verdicts; (2) it cannot be known whether the jury would have convicted defendant of the lesser offense if it had been permitted to do so; and (3) the prejudicial error cannot be cured by defendant's subsequent conviction for the felony assault with which he was charged.

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3. Sentencing—habitual felon—ancillary to indictment for substantive felony

Defendant's conviction for attaining habitual felon status is vacated because: (1) North Carolina's Habitual Felons Act does not authorize an independent proceeding to determine a defendant's status as a habitual felon separate from the prosecution of a predicate substantive felony, and the habitual felon indictment is necessarily ancillary to the indictment for the substantive felony; and (2) a new trial was ordered on defendant's conviction for felony assault with a deadly weapon on a government official.

4. Sentencing—consolidated offenses—remand for resentencing

Defendant's conviction for resisting a public officer is remanded for resentencing, because: (1) the trial court consolidated this conviction with defendant's convictions for assault with a deadly weapon on a government official and attaining habitual felon status for sentencing purposes; and (2) a new trial was ordered on the assault conviction, and defendant's conviction for attaining habitual felon status was vacated.

Appeal by defendant from judgment entered on or about 6 June 2006 by Judge Zoro J. Guice, Jr. in Superior Court, Haywood County. Heard in the Court of Appeals 21 March 2007.

Attorney General Roy A. Cooper, III by Special Deputy Attorney General John J. Aldridge, III for the State-appellee.

William B. Gibson for defendant-appellant.

STROUD, Judge.

Defendant Jerry Dale Smith appeals from judgment entered upon jury verdicts finding him guilty of assault with a deadly weapon on a government official, misdemeanor resisting a public officer, and attaining habitual felon status. These convictions arose out of an altercation in which defendant submerged a Haywood County Deputy Sheriff in the Pigeon River. Defendant assigns error to the trial court's denial of his motion to dismiss the charge of assault with a deadly weapon on a government official and to the trial court's refusal to submit the lesser-included offense of misdemeanor assault on a government official to the jury. In support of these assignments, defendant argues that, as a matter of law, "hands and water" are not deadly weapons. Alternatively, defendant argues that a trial court must sub-

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mit the lesser-included offense of misdemeanor assault on a government official to the jury unless the court determines as a matter of law that the defendant did use a deadly weapon in carrying out the alleged assault. Finally, defendant argues that if this Court reverses his conviction for felony assault with a deadly weapon on a government official, then the Court must also vacate the judgment and commitment under which he was sentenced as a habitual felon.

We hold that “hands and water” together may be deadly weapons. Accordingly, we conclude that the trial court properly denied defendant’s motion to dismiss. However, we agree with defendant that the trial court erred by refusing to submit the lesser-included offense of misdemeanor assault on a government official to the jury. For this reason, we order a new trial on defendant’s conviction for felony assault with a deadly weapon on a government official (04CRS003786). We vacate defendant’s conviction for attaining habitual felon status (04CRS003785). Finally, we remand defendant’s conviction for resisting a public officer (04CRS052937) for resentencing because the trial court consolidated this conviction with defendant’s convictions for assault with a deadly weapon on a government official and attaining habitual felon status for sentencing purposes.

I. Background

On 6 June 2006, Defendant Jerry Dale Smith was tried in Superior Court, Haywood County for two counts of assault with a deadly weapon on a government official, attempted murder, resisting a public officer, and attaining habitual felon status. One count of assault with a deadly weapon on a government official involved the use of handcuffs as the instrument of assault during a fist-fight. The other count of assault involved the use of defendant’s hands and water together as the instrument of the assault, during which defendant submerged the victim in the Pigeon River.

Evidence presented at trial tended to show the following: On 3 August 2004, Haywood County Deputy Sheriff Joseph Patrick Henderson informed the Haywood County Sheriff’s Office that he was traveling on foot to a residence near the Pigeon River. There, Deputy Henderson intended to serve defendant with arrest warrants and to question defendant regarding a breaking and entering. Deputy Henderson had seen defendant coming to and from the residence and was aware that defendant was dating a woman who lived near the Pigeon River. Deputy Henderson was dressed in his official uniform and was wearing his badge, radio, and gun belt.

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Upon arriving at the residence, Deputy Henderson saw defendant exit the back door carrying a suitcase. Deputy Henderson recognized defendant from previous encounters as the person upon whom he needed to serve the arrest warrants. When defendant heard noise from Deputy Henderson's radio, defendant dropped the suitcase and began to flee.

Deputy Henderson identified himself as a deputy sheriff and instructed defendant not to run. Defendant ignored Deputy Henderson's order and the deputy pursued defendant through the woods to the bank of the Pigeon River, where defendant entered the water and fell. Deputy Henderson seized and handcuffed defendant in the river. After handcuffing defendant, Deputy Henderson informed defendant that he was under arrest and walked defendant toward the riverbank.

Arriving at the riverbank, defendant exited the water first. Deputy Henderson followed but slipped forward into defendant, causing them both to fall. Deputy Henderson stood up and tried to grab defendant by his arm to help him stand as well. Defendant jerked away, cursing at Deputy Henderson.

Defendant remained on the ground while Deputy Henderson contacted the dispatch office to request assistance. While Deputy Henderson waited for back-up officers to arrive, defendant became increasingly hostile. Deputy Henderson attempted to stand defendant up again, but defendant continued to pull away. The third time that Deputy Henderson tried to stand defendant up, defendant had escaped from the handcuffs. Defendant lunged toward Deputy Henderson and pushed the deputy hard in the chest, causing Deputy Henderson to fall backward into the river. Defendant jumped into the river and straddled Deputy Henderson, whose lower back was against a large rock, grabbing the deputy by his uniform shirt and vest straps. At trial, Deputy Henderson testified that defendant plunged his head and upper body under the water for what "seemed . . . like forever," using "his upper body strength and all his weight on top of me." Deputy Henderson further testified that defendant held him under the water for between thirty and forty-five seconds, that the water in this area of the river had a strong current, and that the water was a "little higher than the knee." During this time, Deputy Henderson's head, chest, and abdomen were completely submerged in the river.

Deputy Henderson began to panic and attempted to push himself up out of the water, but the weight of defendant pushing down

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and the strong current of the river overcame his initial attempt. On a second attempt to free himself, Deputy Henderson raised his head above water enough to breathe in a single breath. Defendant plunged Deputy Henderson under the water again for approximately fifteen to twenty seconds. Throughout the entire struggle, defendant grasped Deputy Henderson's vest straps, applying force to keep him submerged.

Deputy Henderson then used his right leg and hands to roll defendant to the middle of the river, where they both stood up. Defendant punched Deputy Henderson's head twice, using the handcuffs as "a pair of brass knuckles," with one cuff around his right wrist and the other around his forefingers. As the fight continued, Deputy Henderson used his pepper spray on defendant. After being hit by the pepper spray, defendant ran and attempted to flee again.

Deputy Henderson chased defendant, apprehending him on the riverbank. After seizing defendant, Deputy Henderson engaged defendant in conversation, which quieted him. Deputy Henderson then took defendant into custody.

At the close of all the evidence, defendant moved to dismiss one charge of assault with a deadly weapon on a government official arguing that "hands and water," as a matter of law, are not deadly weapons. The trial court denied defendant's motion. During the charge conference, defendant asked the trial court to instruct the jury on misdemeanor assault on a government official, arguing that the jury could find defendant was guilty of this lesser-included offense. The trial court denied this request as well.

On 6 June 2006, the jury found defendant guilty of assault with a deadly weapon on a government official, with "hands and water" being the deadly weapon; resisting a public officer; and attaining habitual felon status. The jury found defendant not guilty of attempted murder and assault with a deadly weapon on a government officer, with the deadly weapon being handcuffs. On 6 June 2006, the trial court consolidated defendant's convictions, entering a presumptive sentence of 151 months minimum to 191 months maximum imprisonment. Defendant appeals from this final judgment, arguing that the trial court erred by denying his motion to dismiss the charge of assault with a deadly weapon on a government official, with "hands and water" being the deadly weapon and, alternatively, by refusing to submit to the jury the lesser-included offense of misdemeanor assault with a deadly weapon on a government official.

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II. Motion to Dismiss

[1] Defendant assigns error to the trial court's denial of his motion to dismiss the charge of assault with a deadly weapon on a government official. Defendant argues that, as a matter of law, hands and water are not a deadly weapon. We disagree.

When ruling on a defendant's motion to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982); N.C. Gen. Stat. § 15A-1227 (2005). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Cummings*, 46 N.C. App. 680, 683, 265 S.E.2d 923, 925, *aff'd*, 301 N.C. 374, 271 S.E.2d 277 (1980). This Court reviews the trial court's denial of a motion to dismiss *de novo*. *State v. Mckinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982).

The use of a deadly weapon is an essential element of the offense of assault with a deadly weapon upon a government official. N.C. Gen. Stat. § 14-34.2 (2005). The North Carolina Supreme Court has defined a deadly weapon as "any instrument which is likely to produce death or great bodily harm under the circumstances of its use." *State v. Smith*, 187 N.C. 469, 470, 121 S.E. 737, 737 (1924). Sometimes, "the deadly character of [a] weapon depends . . . more upon the manner of its use, and the condition of the person assaulted, than upon the intrinsic character of the weapon itself." *Id.* When the deadly character of an instrumentality is dependent upon the particular circumstances of a case, the question is one of fact to be determined by a jury. *State v. Beal*, 170 N.C. 764, 767, 87 S.E.2d 416, 417 (1915) ("If its character as being deadly or not, depended upon the facts and circumstances, it became a question for the jury with proper instructions from the court."); *State v. Parker*, 7 N.C. App. 191, 195-96, 171 S.E.2d 665, 667-68 (1970) (When there is a question about whether the alleged deadly weapon is "likely to produce fatal results," that is created by "the manner of its use, or the part of the body at which the blow is aimed, its alleged deadly character is one of fact to be determined by the jury.").

The North Carolina Supreme Court has determined that the following instruments may present a jury question as to their deadly nature: a plastic bag placed over the head and face of the victim and secured tightly with tape around the neck, *State v. Strickland*, 290

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N.C. 169, 178, 225 S.E.2d 531, 538 (1976); fire, when the defendant set fire to a house in which a child was sleeping, *State v. Riddick*, 315 N.C. 749, 760, 340 S.E.2d 55, 61 (1986); and a leather belt with a metal buckle, which the defendant used to inflict severe bruises on a three-year-old child, *State v. Cauley*, 244 N.C. 701, 94 S.E.2d 915 (1956). In each of the cases cited above, the defendant used his or her hands to bring the instrument of the assault to the victim.

We note that although it has not been expressly stated in the North Carolina cases involving use of “deadly weapons,” the defendant has invariably used his or her hands in conjunction with each weapon involved. In every North Carolina case cited in this opinion, and in every North Carolina case we have found dealing with an assault with a deadly weapon, the defendant used his or her hands. In all of the cases involving knives, guns, rocks, bricks, sticks, and other similar weapons, each defendant has picked up the weapon with his or her hands in order to use the weapon against the victim. Thus, in the majority of cases, the defendant has used his or her hands to bring the instrumentality of the assault to the victim, but the defendant may also use the hands to bring the victim to the instrumentality of the assault.

In *State v. Brinson*, 337 N.C. 764, 448 S.E.2d 822 (1994), the defendant used his hands to bring the victim to the instruments of the assault, which were the bars and floor of his jail cell. The defendant was indicted for assault with a deadly weapon with intent to kill. *Id.* at 765, 448 S.E.2d at 823. In the indictment, the State alleged that the defendant “slamm[ed]” the victim’s head “against the cell bars and floor,” breaking his neck and causing paralysis. *Id.* at 767, 448 S.E.2d at 824. Considering the sufficiency of that indictment, the North Carolina Supreme Court held that “under [this] . . . indictment the State properly may have asserted at trial that defendant’s fists, the cell floor, the cell bars, or a combination thereof were the deadly weapons which caused the victim’s serious injury.” *Id.* at 769, 448 S.E.2d at 825. In so holding, the Court noted that “[w]hether an item is deadly often depends entirely on its use.” *Id.* at 769, 448 S.E.2d at 825. *State v. Brinson* is analogous to the case *sub judice* in which defendant used his hands to submerge Deputy Henderson’s head, chest, and abdomen in the Pigeon River and to hold him there.

The State presented evidence to show that the manner in which defendant used his hands in conjunction with water was likely to cause death or serious bodily harm to Deputy Henderson, including evidence that defendant pushed Deputy Henderson into the river,

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forcibly held his head under the water, and pushed him back under the water after he managed to get a breath.

Based on the circumstances stated above, the State presented substantial evidence from which a reasonable juror could find that defendant's submerging of Deputy Henderson in the river was likely to produce "death or great bodily harm." Accordingly, we hold that "hands and water" may be a deadly weapon and that the trial court properly submitted this question to the jury.¹ In so holding, we emphasize that defendant did not assault Deputy Henderson with his hands alone; rather, defendant used his hands to bring the deputy to an instrument of the assault, forcibly submerging the deputy in the Pigeon River and holding him there. Therefore, the State need not show that Deputy Henderson was significantly smaller or weaker than defendant or that the deputy was injured or otherwise incapacitated when defendant assaulted him. *Cf. State v. Rogers*, 153 N.C. App. 203, 211, 569 S.E.2d 657, 663 (2002), *disc. review denied*, 357 N.C. 168, 581 S.E.2d 442 (2003) (explaining that, by themselves, "hands and fists may be considered deadly weapons, given the manner in which they were used and the relative size and condition of the parties involved."); *see e.g. State v. Shubert*, 102 N.C. App. 419, 424, 402 S.E.2d 642, 645 (1991) (concluding that the defendant's fists and feet were deadly weapons when used to injure a defenseless eighty-one year old woman).

1. Although we find no reported case in the United States which specifically addresses the use of water as a deadly weapon, there are many reported cases of death by drowning and, in particular, homicides in which drowning in water is the cause of death. The fact that so many cases involving the immersion of the victim in water result in death by drowning and, therefore, are reported as cases of murder or manslaughter may be an indication of just how deadly a weapon water can be. *See e.g., State v. Parker*, 354 N.C. 268, 553 S.E.2d 885 (2001) (first-degree murder conviction for drowning of eighty-six year old victim in a bathtub), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002); *State v. Williams*, 231 N.C. 214, 56 S.E.2d 574 (1949) (involuntary manslaughter conviction for pulling victim who could not swim into deep water, where she drowned); *State v. Scoggins*, 225 N.C. 71, 33 S.E.2d 473 (1945) (manslaughter conviction for drowning victim in a pond); *State v. Epps*, 183 N.C. App. 490, 645 S.E.2d 230 (unpublished) (No. COA06-750) (June 5, 2007) (felony murder conviction in which victim's cause of death was drowning); *In re K.T.L.*, 177 N.C. App. 365, 629 S.E.2d 152 (2006) (involuntary manslaughter adjudication of juvenile, where victim was thrown into a septic tank and drowned), *disc. review denied*, 362 N.C. —, 642 S.E.2d 442 (2007); *State v. Marecek*, 152 N.C. App. 479, 568 S.E.2d 237 (2002) (second-degree murder conviction of husband for drowning his wife at the beach).

There has been at least one unreported case in which water was held to be a deadly weapon. *Martinez v. State*, — S.W.3d — (unpublished) (No. 13-98-400-CR) (August 10, 2000). *Martinez* also involved a defendant who held a law enforcement officer's head under water in a struggle that ensued when the officer attempted to arrest the defendant. *Id.*

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III. Jury Instructions

[2] Defendant assigns error to the trial court's refusal to submit to the jury the lesser-included offense of misdemeanor assault on a government official. In support of this assignment, defendant argues that a trial court must submit the lesser-included offense of misdemeanor assault on a government official to the jury unless the court determines as a matter of law that the defendant did use a deadly weapon. We agree.

When considering whether to submit to the jury a lesser included offense, the trial court must determine whether (1) "the lesser offense is, as a matter of law, an included offense for the crime for which the defendant is indicted" and (2) "there is evidence in the case which will support a conviction of the lesser included offense." *State v. Drew*, 162 N.C. App. 682, 685, 592 S.E.2d 27, 29, *appeal dismissed and disc. review denied*, 358 N.C. 735, 601 S.E.2d 867 (2004).

N.C. Gen. Stat. § 14-34.2 (2005) provides that "an individual is guilty of [felony] assault with a deadly weapon on a government official where the individual: (i) commits an assault; (ii) with a firearm or other deadly weapon; (iii) on a government official; (iv) who is performing a duty of the official's office." *State v. Spellman*, 167 N.C. App. 374, 380, 605 S.E.2d 696, 701 (2004), *disc. review denied*, 359 N.C. 325, 611 S.E.2d 845 (2005). N.C. Gen. Stat. § 14-33 (2005) provides that the elements of misdemeanor assault on a government official are (i) an assault; (ii) on a government official; (iii) when the official is discharging or attempting to discharge his official duties. Because "'all of the essential elements'" of misdemeanor assault on a government official are "'also . . . essential elements included in'" felony assault with a deadly weapon on a government official, it is a lesser included offense of that felony. *See State v. Hinton*, 361 N.C. 207, 210, 639 S.E.2d 437, 439 (2007) (quoting *State v. Weaver*, 306 N.C. 629, 635, 295 S.E.2d 375, 379 (1982), *overruled in part on other grounds by State v. Collins*, 334 N.C. 54, 61, 431 S.E.2d 188, 193 (1993)).

In *State v. Palmer*, 293 N.C. 633, 643, 239 S.E.2d 406, 413 (1977), the North Carolina Supreme Court considered whether the trial court erred by refusing to submit the offense of simple assault to the jury when there was

a conflict in the evidence regarding either the nature of the weapon or the manner of its use, with some of the evidence tending to show that the weapon used or as used would not likely pro-

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duce death or great bodily harm and other evidence tending to show the contrary.

In that case, the defendant used a “hard wooden club weighing two pounds and eleven ounces, approximately 43 1/4 inches long, two inches in diameter at the club end, and one and one-half inches in diameter at the handle” to assault the victim. *Id.* at 635, 239 S.E.2d at 407. At the close of evidence, the trial court instructed jurors that they may return any of six possible verdicts: “guilty of assault with a deadly weapon with intent to kill inflicting serious injury; guilty of assault with a deadly weapon with intent to kill; guilty of assault with a deadly weapon inflicting serious injury, guilty of assault with a deadly weapon; guilty of assault inflicting serious injury; or not guilty.” *Id.* at 641, 239 S.E.2d at 412. Because the facts of *Palmer* created a jury question as to whether the instrument of assault was a deadly weapon, the Court held that the lesser-included offense of simple assault should have been submitted to the jury as well. *Id.* at 643-44, 239 S.E.2d at 413. The Court concluded that *Palmer* “[f]it[] within the principle that a defendant is entitled to have all lesser degrees of offenses supported by the evidence submitted to the jury as possible alternate verdicts.” *Id.* at 643-44, 239 S.E.2d at 413. The Court further concluded that “[f]ailure to submit this option was not cured by the verdict finding that the stick was a deadly weapon” because “it cannot be known whether the jury would have convicted defendant of the lesser offense if it had been permitted to do so.” *Id.* at 644, 239 S.E.2d at 413.²

We determine that *State v. Palmer* controls the case *sub judice*. Having held that the trial court properly submitted to the jury the question of whether defendant’s use of “hands and water” was the use of a “deadly weapon,” we further hold that the trial court erred by refusing to submit to the jury the lesser-included offense of misdemeanor assault on a government official. This is prejudicial error that cannot be cured by defendant’s subsequent conviction for felony assault with a deadly weapon on a government official. *See id.* at 644, 239 S.E.2d at 413; *State v. Thacker*, 281 N.C. 447, 456, 189 S.E.2d 145, 151 (1972) (“Error in failing to submit the question of a defendant’s guilt of lesser degrees of the same crime is not cured by a verdict of guilty of the offense charged because, in such a case, it cannot be known whether the jury would have convicted of a lesser degree if

2. In so holding, the Court also noted that the defendant would not have been entitled to an instruction on simple assault if the “stick” was a deadly weapon as a matter of law. *Id.* at 643, 239 S.E.2d at 413.

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the different permissible degrees arising on the evidence had been correctly presented in the charge.”) Accordingly, we reverse defendant’s conviction for assault with a deadly weapon on a government official and remand this matter to Superior Court, Haywood County for a new trial.

IV. Habitual Felon

[3] Defendant argues that if this Court reverses his conviction for felony assault with a deadly weapon on a government official, then the Court must also vacate the judgment and commitment under which he was sentenced as a habitual felon. We agree.

North Carolina’s Habitual Felons Act, N.C. Gen. Stat. §§ 14-7.1 *et seq.* (2005), provides that a defendant who has been convicted of, or pled guilty, to three felony offenses may be indicted for attaining habitual felon status. *See also State v. Allen*, 292 N.C. 431, 432-33, 233 S.E.2d 585, 587 (1977). “The effect of such a proceeding ‘is to enhance the punishment of those found guilty of crime who are also shown to have been convicted of other crimes in the past.’” *Id.* at 435, 233 S.E.2d at 588 (quoting *Spencer v. Texas*, 385 U.S. 554, 556, 17 L. Ed. 2d 606, 609 (1967)). The act does not authorize an independent proceeding to determine a defendant’s status as a habitual felon separate from the prosecution of a predicate substantive felony, and the habitual felon indictment is necessarily ancillary to the indictment for the substantive felony. *Id.* at 434, 233 S.E.2d at 587; *see also State v. Cheek*, 339 N.C. 725, 453 S.E.2d 862 (1995).

Here, the State indicted defendant on three felony charges: assault with a deadly weapon on a government official, with the deadly weapon being hands and water; assault with a deadly weapon on a government official, with the deadly weapon being handcuffs; and attempted first-degree murder. The jury acquitted defendant of attempted first-degree murder and also acquitted defendant of assault with a deadly weapon on a government official, with the deadly weapon being handcuffs. The jury convicted defendant of the assault with a deadly weapon on a government official, with the deadly weapon being hands and water. Because we order a new trial on this charge, we vacate the judgment sentencing defendant as a habitual felon.

V. Conclusion

For the reasons stated above, we determine that the State presented substantial evidence from which a reasonable juror could find

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that defendant's submerging of Deputy Henderson in the river was likely to produce "death or great bodily harm." Accordingly, we hold that "hands and water" may be a deadly weapon and that the trial court properly submitted this question to the jury. We further hold that the trial court erred by refusing to submit to the jury the lesser-included offense of misdemeanor assault on a government official. This is a prejudicial error that cannot be cured by defendant's subsequent conviction for felony assault with a deadly weapon on a government official.

[4] In summary, we order a new trial on defendant's conviction for felony assault with a deadly weapon on a government official (04CRS003786). We vacate defendant's conviction for attaining habitual felon status (04CRS003785). Finally, we remand defendant's conviction for resisting a public officer (04CRS052937) for resentencing because the trial court consolidated this conviction with defendant's convictions for assault with a deadly weapon on a government official and attaining habitual felon status for sentencing purposes.

Defendant failed to address the remaining assignments of error in his brief and they are deemed waived. N.C.R. App. P. 28(b)(6) (2005).

NEW TRIAL; VACATED IN PART; REMANDED.

Judges McCULLOUGH and CALABRIA concur.

W. DUKE KIMBRELL, PLAINTIFF v. DIANE C. ROBERTS, DEFENDANT

No. COA06-1110

(Filed 18 September 2007)

1. Guaranty— expiration provision—ambiguous—properly submitted to jury

The trial judge properly submitted to the jury the issue of whether a guaranty agreement had expired where the conflicting constructions offered by the parties were both reasonable constructions of the provision.

2. Guaranty— notice of claim—prejudice

The trial court did not err by denying defendant's motions for directed verdict and judgment n.o.v. based on plaintiff's alleged

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failure to provide a contractually required notice of claim on a guaranty. Although plaintiff contended that he had provided notice in a letter, that letter was not timely, even if the substance provided notice. However, the burden was on defendant to show that the lack of notice prejudiced her.

3. Trials— requested instruction not given—encompassed in another

The trial judge did not abuse his discretion by not submitting to the jury a requested instruction where another issue which was submitted encompassed the substance of the requested instruction.

4. Trials— motion for new trial—denial not abuse of discretion

The trial judge did not abuse his discretion by denying defendant's motion for a new trial based on errors raised previously in the opinion where it had been held that those were not errors or abuses of discretion.

Appeal by Defendant from judgment entered 26 January 2006 and order entered 24 February 2006 by Judge Karl Adkins in Superior Court, Gaston County. Heard in the Court of Appeals 25 April 2007.

Kilpatrick Stockton LLP, by J. Robert Elster, Tonya R. Deem, and James J. Hefferan, Jr., for Plaintiff-Appellee.

James, McElroy & Diehl, P.A., by Bruce M. Simpson, for Defendant-Appellant.

McGEE, Judge.

W. Duke Kimbrell (Plaintiff) filed a complaint on 27 October 2003 against Diane C. Roberts (Defendant), and her husband, F.C. Roberts, Jr. (Mr. Roberts), who is not a party to this appeal, alleging that Defendant and Mr. Roberts were principals or insiders of Acme Services, Inc. (Acme Services) in Gastonia, North Carolina. Plaintiff entered into a stock and debenture purchase agreement (the purchase agreement) with Acme Services on 2 October 1992, whereby Plaintiff purchased 57,652 shares of Series C stock (the stock) from Acme Services for \$220,230.64.

Plaintiff also purchased a debenture from Acme Services at the same time in the face amount of \$1,779,769.36. Under the debenture,

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Acme Services agreed to pay the principal sum of \$1,779,769.36 on 2 October 2002, plus interest from 2 October 1992. At the same time as these transactions, Plaintiff, as lender, and Acme Services, as borrower, entered into a credit agreement related to the debenture. Plaintiff and Acme Services also entered into a buy-sell agreement with respect to the stock.

On the same date, Defendant and Mr. Roberts executed a guaranty in which they guaranteed “payment and performance by and all obligations of Corporation under” the purchase agreement, the debenture, the credit agreement, and the buy-sell agreement. Under the guaranty, the “Shareholder” was Plaintiff, the “Corporation” was Acme Services, and “Guarantors” were Defendant and Mr. Roberts. Paragraphs seven and eight of the guaranty provided as follows:

7. EXPIRATION OF GUARANTY. This Guaranty and the Guarantors’ obligations hereunder shall expire at such time as the Shareholder, or his estate, shall no longer be the owner of any of the Series C Shares or all or any part of the Debenture, except to the extent that there is a pending claim or claims under this Guaranty of any of the Corporate Obligations.

8. NOTIFICATION OF CLAIM. Shareholder shall notify Guarantors of any claim hereunder within thirty (30) days after default by Corporation under any of the Corporate Obligations. Any notice hereunder shall be deemed to be duly given if delivered or sent by pre-paid, first class, registered mail to:

Mr. and Mrs. F. C. Roberts, Jr.
P. O. Box 2359
Gastonia, North Carolina 28053-2359

In his complaint, Plaintiff further alleged that “[o]n December 4, 200[2], [Plaintiff] gave notice of default under the terms of the Loan Documents and demanded payment in full of the outstanding indebtedness due on the Debenture.” Plaintiff also alleged the following: “Pursuant to the Loan Documents, [Defendant and Mr. Roberts] are primarily, jointly and severally indebted to [Plaintiff] in the principal amount of \$1,779,769.36, plus all accrued and unpaid interest at 12% per annum and all reasonable costs, expenses, and attorneys’ fees that [Plaintiff] incurs in enforcement of the Guaranty.”

Defendant filed an answer and counterclaim on 12 January 2004, denying the allegation that Plaintiff provided notice of default under

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the debenture. Defendant also raised, *inter alia*, the defense that the guaranty had expired. Specifically, Defendant alleged that the guaranty had expired on 16 December 2002, at the time Plaintiff ceased to be an owner of any of the stock.

At trial, Plaintiff introduced into evidence a letter dated 4 December 2002, which stated the following:

Acme, Inc.
Attention F. C. Roberts, Jr.
Post Office Box 2359
Gastonia, NC 28053-2359

Dear [Mr. Roberts]:

This letter will serve as notice of demand for payment in full of the 12% Debenture for \$1,779,769.36 due October 2, 2002, including any unpaid interest due.

If I have not received payment by January 10, 2003, I will pursue all legal remedies available to collect the amounts owed.

I look forward to hearing from you.

Sincerely,

[Plaintiff]

Defendant testified that she never received Plaintiff's 4 December 2002 letter. Defendant further testified that Roberts Family Ventures, LLC (Roberts Family Ventures), Defendant's and Mr. Robert's family estate planning LLC, purchased the stock from Plaintiff on 16 December 2002 for approximately \$232,000.00. Defendant testified she was under the impression she was relieved of her obligations under the guaranty when Roberts Family Ventures purchased the stock.

At the close of Plaintiff's evidence, Plaintiff and Defendant each moved for a directed verdict, and the trial court denied both motions. Defendant did not present evidence. Both parties renewed their motions for a directed verdict, and the trial court again denied the motions.

Both Plaintiff and Defendant submitted requests for issues to be submitted to the jury and for jury instructions. The trial court submitted the following issues to the jury:

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Issue One:

1. Have the obligations of . . . [D]efendant under the Guaranty Agreement dated October 2, 1992 expired?

Answer: _____

If you answer Issue One “No”, you shall proceed to Issue Two.

If you answer Issue One “Yes”, do not answer Issue Two.

Issue Two:

2. What amount is . . . [P]laintiff entitled to recover from . . . [D]efendant for breach of contract?

Answer: _____

The jury answered the first issue “No” and determined under the second issue that Plaintiff was entitled to \$2,505,719.91. The trial court entered judgment accordingly. Defendant filed a motion for judgment notwithstanding the verdict or for a new trial on 5 February 2005. The trial court denied both motions on 24 February 2006. Defendant appeals.

I.

[1] Defendant argues the trial court erred by denying Defendant’s motion for directed verdict and motion for judgment notwithstanding the verdict. In support of this argument, Defendant contends that under the plain language of the guaranty, the guaranty expired upon Plaintiff’s sale of the stock.

Upon a motion for a directed verdict,

a trial court must view the evidence in the light most favorable to the non-moving party, giving that party the benefit of every reasonable inference arising from the evidence. Any conflicts and inconsistencies in the evidence must be resolved in favor of the non-moving party. If there is more than a scintilla of evidence supporting each element of the non-moving party’s claim, the motion for a directed verdict should be denied. The same standard applies to motions for judgment notwithstanding the verdict.

Jernigan v. Herring, 179 N.C. App. 390, 392-93, 633 S.E.2d 874, 876-77 (2006) (citations omitted), *disc. review denied*, *Jernigan v. Rayfield*, 361 N.C. 355, 645 S.E.2d 770 (2007).

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“The nature and extent of the liability of a guarantor depends on the terms of the contract as construed by the general rules of construction.” *Jennings Communications Corp. v. PCG of the Golden Strand, Inc.*, 126 N.C. App. 637, 641, 486 S.E.2d 229, 232 (1997). “When a court is asked to interpret a contract its primary purpose is to ascertain the intention of the parties.” *International Paper Co. v. Corporex Constructors, Inc.*, 96 N.C. App. 312, 317, 385 S.E.2d 553, 556 (1989). “If a contract is plain and unambiguous on its face the court may interpret it as a matter of law, but where it is ambiguous and the intention of the parties is unclear, interpretation of the contract is for the jury.” *Glover v. First Union National Bank*, 109 N.C. App. 451, 456, 428 S.E.2d 206, 209 (1993). An ambiguity exists where the terms of the contract are reasonably susceptible to either of the differing interpretations proffered by the parties. *Id.* “The fact that a dispute has arisen as to the parties’ interpretation of the contract is some indication that the language of the contract is, at best, ambiguous.” *Id.* (quoting *St. Paul Fire & Marine Ins. Co. v. Freeman-White Assoc., Inc.*, 322 N.C. 77, 83, 366 S.E.2d 480, 484 (1988)).

In the present case, the guaranty read as follows:

7. EXPIRATION OF GUARANTY. This Guaranty and the Guarantors’ obligations hereunder shall expire at such time as the Shareholder, or his estate, shall no longer be the owner of any of the Series C Shares or all or any part of the Debenture, except to the extent that there is a pending claim or claims under this Guaranty of any of the Corporate Obligations.

Defendant argues that under the plain language of this provision, the guaranty would expire if Plaintiff ceased to be the owner of either the stock or the debenture. Therefore, Defendant argues, when Plaintiff ceased to be the owner of the stock, although Plaintiff continued to own the debenture, the guaranty expired. In contrast, Plaintiff argues that under the plain language of this provision, the guaranty would expire only if Plaintiff ceased to be the owner of both the stock and the debenture. Therefore, Plaintiff argues that because he still owned the debenture, the guaranty did not expire upon the sale of the stock.

Although both parties contend that the terms of the guaranty are plain and unambiguous, each party attaches a different meaning to those terms. As we recognized above, this is some indication that the terms of the guaranty were ambiguous. *See Glover*, 109 N.C. App. at 456, 428 S.E.2d at 209. We hold that the two conflicting constructions

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proffered by the parties are both reasonable constructions of the expiration provision of the guaranty. Therefore, we hold that the expiration provision was ambiguous. *See id.* As such, the trial court properly submitted the issue to the jury. Accordingly, we hold the trial court did not err by denying Defendant's motions for directed verdict and judgment notwithstanding the verdict.

[2] Defendant also argues the trial court erred by denying her motion for directed verdict and motion for judgment notwithstanding the verdict because Plaintiff did not provide Defendant with the contractually required notice of a claim. Specifically, Defendant argues that Plaintiff's failure to comply with the provisions regarding notice caused the guaranty to expire. In a related argument, Defendant contends the trial court erred by shifting to Defendant the burden of proof of notice. For the reasons that follow, we disagree and affirm the trial court.

Neither party has cited any authority concerning the effect of the failure of a party to give contractually required notice of default under a guaranty, and our research reveals no North Carolina case directly on point. However, "[c]ourts generally hold that the creditor's failure to give notice of default, where required, does not wholly discharge the obligation, but only releases the guarantor to the extent he is injured or prejudiced by lack of notice." 38 Am. Jur. 2d *Guaranty* § 104 (1999). Similarly, 38A C.J.S. *Guaranty* § 75 (1996) provides:

Although there is authority to the contrary, it is held that a failure to give notice of the principal's default, or negligence in giving such notice, in a case where the guarantor is entitled to notice, does not of itself discharge him from liability and bar a recovery on the guaranty. There must be not only a want of notice within a reasonable time, but also some actual loss or damage thereby caused to the guarantor, and if such loss or damage does not go to the whole amount of the claim, but is only in part, the guarantor is discharged only pro tanto.

We find an out-of-state case, *Russell Nat. Bank v. Smith*, 556 A.2d 899 (Pa. Super. Ct. 1989), *appeal denied*, 568 A.2d 1248 (Pa. 1989), which employed this principle, to be instructive. In *Russell Nat. Bank*, the purchasers entered into an installment sales contract with a dealer for the purchase of a mobile home. *Id.* at 900. The dealer then assigned the contract to a bank for a sum. *Id.* Pursuant to the "full recourse" assignment contract, the dealer agreed to repurchase the contract upon default of the installment sales contract by the pur-

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chasers and upon demand by the bank. *Id.* Subsequently, the purchasers defaulted on the installment sales contract, and the bank sent the purchasers a notice of default and intent to execute. *Id.* The purchasers did not cure the default and the bank sent them a notice that their mobile home had been repossessed. *Id.*

The bank then demanded that the dealer repurchase the contract and, following the dealer's refusal, the bank sued the dealer. *Id.* at 900-01. The Superior Court of Pennsylvania held that, by its actions, the bank had repossessed the mobile home. *Id.* at 901. The Pennsylvania court also recognized that the bank was required by statute to give notice to the dealer of the bank's intent to execute, which the bank did not do. *Id.* at 901-02. However, relying upon Am. Jur. 2d and C.J.S. the Court held:

The [b]ank's failure to comply with this notice requirement, however, does not of itself discharge the [d]ealer from its obligation under the full recourse provision of the assignment contract. Rather, the lack of notice releases the [d]ealer from its liability under the contract only if the [d]ealer was injured by the lack of notice and then only to the extent of the injury. *See* 38 Am. Jur. 2d Guaranty § 107, at 1113 (1968) (failure to give notice of debtor's default to guarantor "only releases the guarantor to the extent that damage or prejudice may have been occasioned to him by lack of notice"); 38 C.J.S. Guaranty § 63, at 1225 (1943) ("[T]here must be not only a want of notice within reasonable time, but also some actual loss or damage thereby caused to the guarantor, and if such loss or damage does not go to the whole amount of the claim, but is only in part, the guarantor is discharged only pro tanto.").

Id. at 902. The Court then held that the dealer was not harmed by a lack of notice from the bank and that "the [d]ealer's obligations under the assignment contract remain[ed] intact." *Id.*

The parties in the present case also have not cited, nor have we found, any North Carolina case law regarding which party has the burden of proof on the issue of notice of default. On this issue, there appears to be a split of authority in other jurisdictions: "Some courts require the creditor to prove it provided notice of . . . default to the guarantor if such notice is required, though other cases hold that failure to provide such notice is an affirmative defense and not part of the creditor's prima facie case." 38 Am. Jur. 2d *Guaranty* § 117 (1999). Similarly, 38A C.J.S. *Guaranty* § 118 (1996) provides:

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Where notice to the guarantor of the principal's default is required as a condition to fixing liability on him, . . . the burden in some jurisdictions is on plaintiff to show that such notice was given to the guarantor, or, if it was not given, to show a sufficient excuse therefor, such as that the principal was insolvent; and it is then incumbent on the guarantor to rebut the prima facie case which plaintiff, by showing such insolvency, has made. In other jurisdictions, however, where defendant asserts want of notice, the burden is on him to show, as a matter of defense, the failure to give such notice or negligence in doing so and that he has sustained damage thereby.

Although not directly on point, our Supreme Court spoke to a similar issue in *Smith v. N.C. Farm Bureau Mutual Ins. Co.*, 321 N.C. 60, 361 S.E.2d 571 (1987), and we find the Court's analysis instructive. In *Smith*, the plaintiff sought to recover from the defendant insurance company under a fire insurance policy. *Id.* at 61, 361 S.E.2d at 572. The trial court granted the defendant's motion for a directed verdict on the ground that the plaintiff failed to show that he properly submitted the proof of loss required by the policy. *Id.* at 61-62, 361 S.E.2d at 572.

The Supreme Court recognized that a divided panel of the Court of Appeals had reversed, noting that "under the provisions of N.C.G.S. § 58-180.2, the failure to comply with the proof of loss provisions does not relieve the insurer of its obligation to pay under the policy if the failure was for 'good cause' and did not prejudice the insurer's ability to defend." *Id.* at 62, 361 S.E.2d at 573 (citing *Smith v. N.C. Farm Bureau Mutual Ins. Co.*, 84 N.C. App. 120, 122-23, 351 S.E.2d 774, 776 (1987) (citation omitted)). However, because N.C.G.S. § 58-180.2 was silent as to which party bore the burden of proof on the issues of "good cause" and "prejudice," the majority in the Court of Appeals relied upon *Great American Insurance Co. v. C.G. Tate Construction Co.*, 303 N.C. 387, 279 S.E.2d 769 (1981), to hold that the plaintiff had the burden of proving "good cause" and the defendant insurance company had the burden of proving "prejudice." *Id.* at 62, 361 S.E.2d at 573. The majority held that because the plaintiff had presented evidence sufficient to raise a jury question as to "good cause," and because the insurance company did not offer evidence of prejudice, the directed verdict for the defendant should be reversed. *Id.* at 63, 361 S.E.2d at 573. The dissent challenged the majority's extension of *Great American Insurance Co.*, which had dealt with automobile liability insurance, to fire insurance cases. *Id.* at 63, 361 S.E.2d at 573.

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Our Supreme Court affirmed, recognizing that the only issue before it was the “issue of the proper placement of the burdens of proof[.]” *Id.* at 65, 361 S.E.2d at 575. Our Supreme Court stated as follows:

In *Great American [Insurance Co.]* we held that the insured has the burden of showing “good faith” in failing to properly notify the insurance company. 303 N.C. at 399, 279 S.E.2d at 776. Once that burden is carried, “the burden then shifts to the insurer to show that its ability to investigate and defend was materially prejudiced by the delay.” *Id.* We reasoned that the insurer must bear the burden of proof on the issue of prejudice because it is in the better position to offer proof on the issue and because such allocation of the burden encourages the insurer to investigate quickly once it has actual notice. 303 N.C. at 398, 279 S.E.2d at 776. The majority in the Court of Appeals correctly concluded that the same reasoning applied equally as well to the proof of loss provisions of a fire insurance contract. Accordingly, the majority held that the insured under the fire insurance policy must bear the burden of proof as to “good cause” for the failure to give timely proof of loss, but the insurer must bear the burden of proof as to prejudice. We agree.

Id. at 66, 361 S.E.2d at 575.

The reasoning of *Smith* and *Great American Insurance Co.* applies equally to the present case. In that a failure to give notice when required only discharges a guarantor to the extent the guarantor is prejudiced thereby, it is appropriate to place on the guarantor the burden of proof on this issue. The guarantor is in a better position to show the extent to which the guarantor was prejudiced or injured by a failure of the creditor to give the required notice under the guaranty.

In the present case, the guaranty required that Plaintiff give notice as follows:

8. NOTIFICATION OF CLAIM. Shareholder shall notify Guarantors of any claim hereunder within thirty (30) days after default by Corporation under any of the Corporate Obligations. Any notice hereunder shall be deemed to be duly given if delivered or sent by pre-paid, first class, registered mail to:

Mr. and Mrs. F. C. Roberts, Jr.
P. O. Box 2359
Gastonia, North Carolina 28053-2359.

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The guaranty did not specify the effect of the failure to give such notice. Plaintiff contends that his 4 December 2002 letter sufficed as notice under the guaranty. However, even if the substance of the letter put Defendant on notice, the letter was not sent within thirty days of Acme Services' default on 2 October 2002, and therefore did not comply with the guaranty provision.

In accordance with the authorities cited above, this failure was not fatal. In order to discharge Defendant from all liability under the guaranty, the failure to give the contractually required notice must have caused some prejudice, loss, or damage to Defendant. *See* 38 Am. Jur. 2d *Guaranty* § 104; 38A C.J.S. *Guaranty* § 75. Moreover, if Defendant had the burden of proof on this issue, the simple failure to provide notice required under the guaranty did not defeat Plaintiff's *prima facie* claim under the guaranty. *See* 38 Am. Jur. 2d *Guaranty* § 117; 38A C.J.S. *Guaranty* § 118.

An Illinois case, *Mid-City Indus. Supply Co. v. Horwitz*, 476 N.E.2d 1271 (Ill. App. Ct. 1985), applying these principles, is analogous to the present case and instructive. In *Horwitz*, the plaintiff sought to recover under a purported personal guaranty executed by the defendant. *Id.* at 1273. At the close of the plaintiff's case-in-chief at a bench trial, the defendant moved for a directed finding and the trial court granted the motion. *Id.* Accordingly, the trial court entered judgment for the defendant, finding that, *inter alia*, the plaintiff had failed to satisfy its burden of proof by "fail[ing] to establish that a demand for payment was ever made on [the] defendant personally." *Id.*

The Court recognized that "[i]n a suit brought on a collateral or continuing guarantee, such as the one sued on in this case, a *prima facie* case is made when the plaintiff enters proof of the original indebtedness, the debtor's default and the guarantee." *Id.* at 1277. The Court further recognized as follows:

Failure to notify a guarantor of the debtor's default has no other effect than to afford him a defense to the extent of the loss or damage sustained as a result of such failure. This defense must be specially pleaded by the guarantor and the plea and proof must also declare and show that the guarantor sustained a loss or damage resulting from the lack of notice.

Id. (citations omitted). The Court held:

Applying these principles to the case at bar, it is clear that lack of notice of the debtor's default is a defense which must be

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pleaded and proved by [the] defendant, not [the] plaintiff. Accordingly, any failure of proof on this issue is irrelevant in making a determination of whether [the] plaintiff has established a *prima facie* case.

Id. Therefore, the Court held that the trial court erred by granting the defendant's motion for a directed finding and by entering judgment for the defendant. *Id.*

Likewise, in the present case, any failure to comply with the notice provisions of the guaranty did not entitle Defendant to a directed verdict. Rather, we hold the burden was on Defendant to show that the lack of notice prejudiced her. Accordingly, the trial court did not err by denying Defendant's motion for directed verdict and motion for judgment notwithstanding the verdict on this basis. Moreover, the trial court did not err by shifting the burden of proof to Defendant on the issue of notice.

II.

[3] Defendant argues the trial court erred by refusing to submit to the jury Defendant's requested issue regarding notice. "It is an elementary principle of law that the trial judge must submit to the jury such issues as are necessary to settle the material controversies raised in the pleadings and supported by the evidence." *Griffis v. Lazarovich*, 161 N.C. App. 434, 440, 588 S.E.2d 918, 922-23 (2003) (quoting *Uniform Service v. Bynum International, Inc.*, 304 N.C. 174, 176, 282 S.E.2d 426, 428 (1981)), *disc. review denied*, 358 N.C. 375, 598 S.E.2d 135 (2004). However, "[t]he number, form and phraseology of the issues lie within the sound discretion of the trial court, and the issues will not be held for error if they are sufficiently comprehensive to resolve all factual controversies and to enable the court to render judgment fully determining the cause." *Id.* at 440, 588 S.E.2d at 923 (quoting *Chalmers v. Womack*, 269 N.C. 433, 435-36, 152 S.E.2d 505, 507 (1967)).

In the present case, Defendant requested that the following issue be submitted to the jury:

1. Did Plaintiff properly notify Defendant of a claim under the Guaranty within 30 days after default by Acme Services, Inc.?

Answer: _____

(If you answer Issue 1 "yes," you should proceed to Issue 2. If you answer Issue 1 "no," do not answer any further issues.)

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The trial court did not submit this issue to the jury. Rather, the trial court submitted the following issue to the jury:

1. Have the obligations of . . . [D]efendant under the Guaranty Agreement dated October 2, 1992 expired?

The trial court instructed the jury as follows:

The first issue reads: Have the obligations of . . . [D]efendant under the Guaranty Agreement dated October 2, 1992, expired. . . . [D]efendant acknowledges signing the Guaranty Agreement and assuming the corporate obligations set forth in the guaranty. However, . . . [D]efendant contends and . . . [P]laintiff denies that her obligation expired upon . . . [P]laintiff's sale of the preferred stock or . . . [P]laintiff failed to give proper notice to . . . [D]efendant. On this issue . . . [D]efendant has the burden of proof. This means that . . . [D]efendant must prove by the greater weight of the evidence that her guaranty expired upon the sale of preferred stock or that . . . [P]laintiff failed to give proper notice to . . . [D]efendant. Finally, as to this first issue on which . . . [D]efendant has the burden of proof, if you find by the greater weight of the evidence that the guaranty expired upon the sale of the preferred stock or that . . . [P]laintiff failed to give proper notice to . . . [D]efendant, it would be your duty to answer this issue yes in favor of . . . [D]efendant. If you fail to so find, it would be your duty to answer this issue no in favor of . . . [P]laintiff. If you answer Issue 1 no, you shall proceed to answer Issue 2. If you answer Issue 1 yes, this is your verdict, do not answer Issue 2.

It is clear that the first issue submitted to the jury by the trial court encompassed the substance of Defendant's requested instruction. The trial court instructed the jury that if it found that either the guaranty expired upon the sale of the stock, or that Plaintiff failed to give proper notice to Defendant, it would be the duty of the jury to answer the issue "Yes" in favor of Defendant. Accordingly, the trial court did not abuse its discretion by failing to submit to the jury Defendant's requested issue.

III.

[4] Defendant argues that on the basis of the errors alleged in its previous assignments of error, the trial court erred by denying Defendant's motion for a new trial. However,

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[i]t has been long settled in our jurisdiction that an appellate court's review of a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge.

Worthington v. Bynum, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982).

In the present case, we have already determined that the trial court did not commit error or abuse its discretion. Therefore, we hold the trial court did not abuse its discretion by denying Defendant's motion for a new trial.

Moreover, because we find for Plaintiff on the merits of the case, we need not reach Plaintiff's cross-assignments of error.

Affirmed.

Judges JACKSON and STROUD concur.

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PETITIONERS v. ROWAN COUNTY BOARD OF COMMISSIONERS, RESPONDENT,
MT. ULLA HISTORICAL PRESERVATION SOCIETY, AND INTERESTED CITIZENS,
PROSPECTIVE-ALTERNATIVE CROSS PETITIONER

No. COA06-1444

(Filed 18 September 2007)

1. Zoning—radio tower—local ordinances—not preempted by federal aviation law

The trial court properly concluded that Rowan County's zoning ordinances are not preempted by federal aviation law in an action involving a conditional use permit for a radio broadcast tower. The Rowan County Board of Adjustment's decision was an exercise of precisely the type of local control over private use airports that the FAA specifically endorsed and encouraged.

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2. Zoning—radio tower—safety hazard—whole record test—evidence sufficient

There was substantial evidence to support the Rowan County Board of Adjustment's decision that a radio broadcast tower would be a safety hazard to a private use airport, although petitioners presented evidence from which the opposite could be found, and the superior court correctly upheld the Board.

Appeal from Petitioners Davidson County Broadcasting, Inc., and Richard and Dorcas Parker from Order entered 7 June 2006 by Judge W. David Lee in Superior Court, Rowan County. Heard in the Court of Appeals 10 May 2007.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P. by Derek J. Allen for Petitioner-Appellants.

Kluttz, Reamer, Hayes, Randolph, Adkins & Carter, LLP by Richard R. Reamer for Cross-Petitioner Appellee.

Parker, Poe, Adams & Bernstein, LLP by Anthony Fox for Respondent-Appellee.

STROUD, Judge.

Petitioners Davidson County Broadcasting, Inc., and Richard and Dorcas Parker instituted this action against respondent Rowan County Board of Commissioners to review respondent's denial of petitioners' application for a conditional use permit to construct a 1,350 foot radio broadcast tower on Richard and Dorcas Parkers' property in Rowan County, North Carolina. In this appeal, we must consider both whether Rowan County is precluded from regulating air safety under the doctrine of federal preemption and whether the superior court correctly concluded that there was competent, material, and substantial evidence to support respondent's decision to deny petitioners' conditional use permit. For the following reasons, we hold that federal law does not preempt Rowan County's regulations in this situation and we affirm the superior court's order upholding the decision of the Rowan County Board of Commissioners.

I. Background

On 18 January 2005, petitioner Davidson County Broadcasting, Inc. ("DCBI") applied for a conditional use permit ("CUP") to construct a 1,350 foot radio tower ("tower") on property owned by petitioners Richard and Dorcas Parker ("Parkers"). Respondent Rowan

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County Board of Commissioners (“Board”) conducted a public hearing to consider the application on 13 October, 24 October, and 7 November 2005. The Board voted to deny the CUP on 7 November 2005 and adopted a written decision denying the CUP on 21 November 2005.

DCBI and the Parkers filed a petition for writ of certiorari with the Superior Court, Rowan County on 9 December 2005, seeking review under N.C. Gen. Stat. § 153A-340(c) (2005) of the Board’s denial of the CUP. The petition was allowed on the same date. On 21 December 2005, Mt. Ulla Historical Preservation Society and Interested Citizens (“Mt. Ulla”) filed a cross alternative petition for certiorari and motion to intervene before the superior court. The court allowed the petition on the same date.¹ The petition for certiorari was heard in Superior Court, Rowan County, before the Honorable Judge W. David Lee, on 13 March 2006. The superior court entered its order on 7 June 2006, *nunc pro tunc* to 13 March 2006, affirming the Board’s decision to deny the CUP. Petitioners appeal from this order.

The Rowan County zoning ordinance requires that an applicant for a CUP demonstrate that

- (1) Adequate transportation access to the site exists;
- (2) The use will not significantly detract from the character of the surrounding area;
- (3) Hazardous safety conditions will not result;
- (4) The use will not generate significant noise, odor, glare, or dust;
- (5) Excessive traffic or parking problems will not result; and
- (6) The use will not create significant visual impacts for adjoining properties or passersby. (Ord. of 1-19-98, § IV)

Rowan County, N.C., Code § 21-59 (1991). Rowan County Code § 21-60 (3) contains additional specific requirements for communi-

1. On 1 March 2006 Petitioners filed a motion to dismiss Mt. Ulla’s cross petition and motion to intervene, but the superior court never ruled on this motion. Pursuant to N.C.R. App. P. 10(b)(1), this issue was not preserved for appellate review as petitioners did not obtain a ruling upon the motion to dismiss. N.C.R. App. P. 10(b)(1). Also, no error has been assigned or argued as to Mt. Ulla’s status as a party to this appeal.

We also note that the order failed to list Mt. Ulla in the caption. We have therefore added Mt. Ulla to the caption of this case.

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cations and telecommunications towers. Rowan County, N.C., Code § 21-60 (1991). The Board's denial of the CUP was based upon Rowan County Code § 21-59(3), as the decision found that "hazardous safety conditions will result from the approval of the use." (emphasis in original).

The Board further found as follows

(19) Marshall Sanderson with the Division of Aviation of the North Carolina Department of Transportation testified on behalf of the NCDOT Aviation Division and asked that the construction of the tower at the proposed location not be allowed.

(20) Mr. Sanderson further testified that the proposed tower location will be a hazard to aircraft using Miller Air Park and would penetrate air traffic patterns.

(21) Mr. Phil Loftin, a commercially-rated pilot in single and multi-engine aircraft with over 5000 hours, also testified that the location of the tower would be a hazard to the flying public.

(22) Captain John Cox, a master pilot with more than 35 years experience and 14,000 hours, testified that the construction of a 1350' broadcast tower on the property will be on the extended center line of Miller Air Park runway and within five statute miles of the air park. He further testified that the tower will not meet adequate safety criteria and will pose significant risks to air traffic during take offs and landings.

(23) Mr. Cox discussed the normal flight operations at and around Miller Airpark and pointed out that pilots will not be able to see the tower on hazy days. He also presented documentation detailing past airplane crashes into comparable towers.

(24) Staff and the Applicant provided a letter, "Determination of No Hazard", from the FAA indicating that the proposed tower would offer no threat to aircraft operation. However, it was pointed out that the FAA's review included only flight operations to and from public airports. Miller Airpark is a private airport to which the FAA regulations do not apply.

(25) Further, the study done by the FAA prior to issuing its letter of no impact did not consider the private Miller Airpark.

(26) Sonny Schumacher, an expert witness, testified about the normal operation of aircraft at Miller Airpark and indicated that

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most departures were to the south and that landings were to the north, which would make the tower less of a problem. But, he admitted that this could be reversed based on wind direction. His report explained the FAA standards that apply to obstructions like towers.

(27) Mr. Loftin, a long time pilot, presented a videotape showing the conditions an operator of a small plane flying out of Miller Airpark would experience. The video demonstrated that towers are difficult to see, pose dangers to the flying public and that upon departing the airport to the north, due to the nose attitude [sic] of the plane during a normal climb, a pilot will not see the tower when the tower is positioned directly ahead of the plane, which occurs during normal departures or missed approaches.

(28) Several experienced pilots (Wayne McConnell, Michael Henry, Louis Dunn and Jack Edwards) testified about the impact the tower would have on air traffic safety, especially into and out of Miller Airpark.

(29) Chris Hudson, the regional representative of the Aircraft Owners and Pilots Association also testified about the negative impacts of the tower and its proposed location on safety.

(30) Overwhelming evidence was presented concerning the impact of the proposed tower on air safety.

(31) This tower unnecessarily will reduce the safety of flight operations in the area and result in hazardous safety conditions if approved.

The superior court, based upon review of the whole record, determined that the above findings of fact were based upon “competent and substantial evidence in the record, including the testimony of numerous pilots, an aviation expert, and a NCDOT representative.” The superior court also considered the question of federal preemption *de novo* and determined that

federal regulation of airspace management is not so broad as to preclude Respondent from exercising its traditional role of regulating the use of structures in Rowan County Respondent’s role as land use determiner under its sovereign power to impose reasonable land use restrictions does not impede or interfere with the federal authority to regulate flights in navigable air-

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space, to insure the efficient use of airspace, and to insure the safety of aircraft in the air or on the ground consistent with its obligations to regulate the frequency, routes, price, or service of air carriers.

II. Standards of Review

A particular standard of review applies at each of the three levels of this proceeding—the Board, the superior court, and this Court. *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 12-14, 565 S.E.2d 9, 16-18 (2002). First, the Board is the finder of fact in its consideration of the application for a special use permit. *Id.*, 356 N.C. at 12, 565 S.E.2d at 17. The Board is required, as the finder of fact, to

follow a two-step decision-making process in granting or denying an application for a special use permit. If an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, *prima facie* he is entitled to it. If a *prima facie* case is established, a denial of the permit then should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record.

....

Any decision of the town board has to be based on competent, material, and substantial evidence that is introduced at a public hearing.

Id., 356 N.C. at 12, 565 S.E.2d at 16-17. A Board's "findings of fact and decisions based thereon are final, subject to the right of the courts to review the record for errors in law and to give relief against its orders which are arbitrary, oppressive or attended with manifest abuse of authority." *Id.*, 356 N.C. at 12, 565 S.E.2d at 17 (citation and quotations omitted).

Upon appeal from the Board to the superior court, the superior court acts as a court of appellate review. *Id.* The superior court's task is:

- (1) Reviewing the record for errors in law,
- (2) Insuring that procedures specified by law in both statute and ordinance are followed,

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(3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,

(4) Insuring that decisions of . . . boards are supported by competent, material and substantial evidence in the whole record, and

(5) Insuring that decisions are not arbitrary and capricious.

Id., 356 N.C. at 13, 565 S.E.2d at 17 (citation omitted).

The standard of review to be applied by the superior court depends upon the type of error assigned. *Id.* “If the error assigned is that a board’s decision is not supported by the evidence or is arbitrary or capricious, the superior court must apply the whole record test. *Id.* *De novo* review is appropriate “if a petitioner contends the board’s decision was based on an error of law,” *Id.* (citations and quotations omitted). Whether federal law preempts state law is a question of a law which is reviewed *de novo*. *Cox v. Shalala*, 112 F.3d 151, 153 (4th Cir. 1997).

When using *de novo* review,

the superior court considers the matter anew and freely substitutes its own judgment for the [board’s] judgment. When utilizing the whole record test, however, the reviewing court must examine all competent evidence (the “whole record”) in order to determine whether the [board’s] decision is supported by “substantial evidence.” The “whole record” test does not allow the reviewing court to replace the board’s judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*.

Mann Media, Inc., 356 N.C. at 13-14, 565 S.E.2d at 17-18 (internal citations and quotations omitted). Also, the superior court “must set forth sufficient information in its order to reveal the scope of review utilized and the application of that review.” *Id.*, 356 N.C. at 13, 565 S.E.2d at 17 (citations and quotations omitted).

When this Court reviews a superior court’s order regarding a zoning decision by a Board of Commissioners, we examine the order to: “(1) determin[e] whether the [superior] court exercised the appropriate scope of review and, if appropriate, (2) decid[e] whether the court did so properly.” *Id.*, 356 N.C. at 14, 565 S.E.2d at 18 (citations and quotations omitted).

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III. Preemption by Federal Law

[1] Petitioners first argue that the federal regulations of navigable airspace administered by the Federal Aviation Administration (“FAA”) preempt Rowan County’s authority under its zoning ordinances to regulate the location of the proposed tower. Petitioners contend that the FAA has the duty and authority to regulate air safety for the entire nation and that the federal government made the determination that the proposed tower would not pose a hazard to air safety, as stated in the FAA’s “Determination of No Hazard to Air Navigation”² issued regarding the proposed tower. Respondent contends that there is no conflict between the FAA’s regulations and Rowan County’s ordinances and that local governments are permitted to make aviation-related land use decisions.

Federal preemption of state or local land-use regulation involving tall structures such as radio towers by the FAA is an issue of first impression before this Court. Federal preemption is constitutionally based upon the Supremacy Clause, U.S. Constitution, art. VI, which “may entail pre-emption of state law . . . by express provision” *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 131 L. Ed. 2d 695, 704 (1995). “The constitutional principle underlying the doctrine of preemption is the avoidance of conflicting regulation of conduct by various official bodies . . . , each of which has a degree of authority over the subject matter at issue.” *State ex rel. Utilities Comm’n v. Carolina Power & Light Co.*, 359 N.C. 516, 524, 614 S.E.2d 281, 287 (2005). In this case, the question is not the scope of the FAA’s authority, but it is “the other legal question that can arise in the context of preemption, that is, ‘whether a given state authority conflicts with, and thus has been dis-

2. The FAA issued a document entitled “Determination of No Hazard to Air Navigation” regarding the proposed tower on 5 September 2002, which provided in pertinent part that

[t]his aeronautical study revealed that the structure would have no substantial adverse effect on the safe and efficient utilization of the navigable airspace by aircraft or on the operation of air navigation facilities This determination concerns the effect of this structure on the safe and efficient use of navigable airspace by aircraft and does not relieve the sponsor of compliance responsibilities relating to any law, ordinance, or regulation of any Federal, State, or local government body.

The aeronautical study which was attached to the letter noted that “Miller Air Park was considered to be a private use airport and the traffic pattern was not considered” by the aeronautical study, under 14 C.F.R. § 77, the applicable federal aviation regulations.

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placed by, the existence of Federal Government authority.’” *Id.*, 359 N.C. at 525, 614 S.E.2d at 287 (citation omitted).

We must begin our analysis with “a presumption against federal preemption.” *Id.* “‘Where . . . the field that Congress is said to have pre-empted has been traditionally occupied by the States ‘we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’” *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715, 85 L. Ed. 2d 714, 722-23 (1985) (citations omitted).

Federal aviation law contains an express preemption provision which does permit some types of state and local regulation. 49 U.S.C. § 41713(b)(1) (2004). Specifically, 49 U.S.C. § 41713(b)(1) provides that

[e]xcept as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

Id. Some courts have held that the state or local zoning regulation of radio towers is preempted by the federal aviation regulations.³ However, a majority of courts in the United States which have considered the issue have held that federal aviation law does not preempt all local or state land use regulation which may affect aviation.⁴

3. See e.g., *Big Stone Broad., Inc. v. Lindbloom*, 161 F.Supp.2d 1009, 1016 (N.D.S.D. 2001) (holding that “the field of air space management, at least as to radio broadcast towers” is federally preempted by the regulations of the FAA and Federal Communications Commission “from state regulatory authority.”).

4. See e.g., *Faux-Burhans v. Cty. Comm'rs of Frederick County*, 674 F.Supp. 1172, 1174 (1987), *aff'd*, 859 F.2d 149 (4th Cir. 1988), *cert. denied*, 488 U.S. 1042, 102 L. Ed. 2d 992 (1989) (noting no federal preemption of local ordinances regulating the “size, scope, and manner of operations at a private airport” which are “all areas of valid local regulatory concern” and which do not inhibit “in a proscribed fashion the free transit of navigable airspace.”); see also *Aeronautics Comm'n v. State ex rel. Emmis Broad. Corp.*, 440 N.E.2d 700, 704 (Ind. App. 1982) (holding that the Indiana High Structures Safety Act, I.C. 8-21-7-1 to 15, regulating the height of structures near airports is not preempted by federal law, because “Congress has evidenced a purpose to leave legal enforcement of regulations pertaining to high structures and air safety to state and local governments.”); *Hoagland v. Town of Clear Lake*, 344 F.Supp.2d 1150 (N.D. Ind. 2004), *aff'd*, 415 F.3d 693 (7th Cir. 2005), *cert. denied*, 547 U.S. 1004, 164 L. Ed. 2d 249 (2006) (holding that local land use regulations regarding use of a heliport are not preempted, and containing an excellent survey of many state and federal cases dealing with the issue of federal preemption and local land use regulations which may affect aviation).

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Therefore, we must consider whether there is an actual conflict between the Rowan County zoning ordinance and federal law. "Such a conflict arises when compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *State ex rel. Utilities Comm'n*, 359 N.C. 516, 525, 614 S.E.2d 281, 287 (quoting *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 204, 75 L. Ed. 2d 752, 765 (1983) (citations and internal quotations omitted).

In this case, there is no conflict between the federal aviation law and Rowan County's zoning law. Petitioners argue that the FAA's "no hazard" determination conflicts with and overrules the zoning ordinance, since the FAA found that the tower would not be a hazard to air navigation. However, the "no hazard" letter itself states that it "does not relieve the sponsor of compliance responsibilities relating to any law, ordinance, or regulation of any Federal, State, or local government body." In addition, the aeronautical study upon which the "no hazard" letter was based specifically did not consider Miller Air Park, because it was a "private use airport." The Board's findings of fact relate to safety considerations for air traffic to or from Miller Air Park, which was specifically not addressed by the FAA's study.

The FAA's position regarding preemption is that federal regulations not only permit, but encourage, this type of local regulation to maintain the safety of private use airports. The record contains a letter from the FAA's Airports District Office manager, Scott Seritt, to the Board's Chairman, Gus Andrews, dated 10 March 2004. The letter regarding Rowan County's development of "land use regulations that would protect the airspace of the Rowan County Airport and approximately 17 private-use airports from tall structures" stated:

As you know, Rowan County is obligated, through your federal grant agreements, to protect the terminal airspace of the Rowan County Airport. **This is control that must be exercised at the local and/or state level as the federal government does not have the power to protect that airspace for you.**

While there are no requirements that you protect the airspace of private-use airports, it is certainly a wise decision. Small airports are the backbone of aviation in the United States Their airspace is a precious commodity and, once it is lost, it is seldom regained. Tall structures can have significant effects on

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the approaches into airports and in extreme cases can cause airports to close.

The protection of our nations [sic] airports is vital. **It is important that local communities recognize these assets and provide the necessary protection both in terms of land usages and height restrictions.** With appropriate regulations in place, local officials can make informed decisions as to the need to protect their aviation assets in balance with needs for economic development and private enterprise.

Thus, the Board's decision regarding the CUP was an exercise of precisely the type of local control over private use airports that the FAA specifically endorsed and encouraged, because the FAA did **not** have the authority to provide this protection. The superior court therefore properly conducted *de novo* review of this issue and correctly concluded that Rowan County's zoning ordinances are not preempted by federal law in this instance.

IV. Decision Supported by Substantial Evidence

[2] Petitioners next contend that the Board's decision was not supported by substantial, competent, and material evidence in the whole record and that the decision was arbitrary and capricious. On this issue, the superior court was required to use the "whole record" test, and the order specifically states that the court used this test. *Mann Media, Inc.*, 356 N.C. at 13, 565 S.E.2d at 17. Thus our role is to determine if the superior court properly applied the "whole record" test. *See id.*, 356 N.C. at 14, 565 S.E.2d at 18.

Petitioners correctly note that the Board's findings were all in favor of the petitioners, except on the issue of air safety. As we have determined that the Board is not preempted from making its determination based upon air safety, we are also aware that "[z]oning ordinances derogate common law property rights and must be strictly construed in favor of the free use of property." *Lambeth v. Town of Kure Beach*, 157 N.C. App. 349, 354, 578 S.E.2d 688, 691. "Every person owning property has the right to make any lawful use of it he sees fit, and restrictions sought to be imposed on that right must be carefully examined to prevent arbitrary, capricious or oppressive action under the guise of law." *Vance S. Harrington & Co. v. Renner*, 236 N.C. 321, 324, 72 S.E.2d 838, 840 (1952).

If an applicant produces competent, material, and substantial evidence which establishes the facts and conditions required by the

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ordinance for the issuance of a conditional use permit, the applicant is *prima facie* entitled to issuance of the permit. *Humble Oil & Refining Co. v. Bd. of Alderman*, 284 N.C. 458, 468, 202 S.E.2d 129, 136 (1974). “Denial of a conditional use permit must be based upon findings which are supported by competent, material, and substantial evidence appearing in the record.” *Howard v. City of Kinston*, 148 N.C. App. 238, 246, 558 S.E.2d 221, 227 (2002). In the case *sub judice*, we have therefore carefully examined the evidence regarding the air safety issues relevant to Miller Air Park to determine if the Board’s findings on this issue were supported by “substantial evidence” and were not arbitrary or capricious.

As correctly noted by the superior court, the evidence included the “testimony of numerous pilots, an aviation expert, and a NCDOT representative” as well as extensive documentary evidence, all of which supported the Board’s findings regarding the safety hazards posed by the tower to air traffic of Miller Air Park. Petitioners argue that the testimony of the pilots and other witnesses presented by appellees was erroneous, anecdotal, or inadequate in various respects. However, in applying the whole record test, “the trial court may not weigh the evidence presented to the agency or substitute its own judgment for that of the agency.” *Bellsouth Carolinas PCS, L.P. v. Henderson Cty. Zoning Bd. of Adjustment*, 174 N.C. App. 574, 576, 621 S.E.2d 270, 272 (2005).

Although the petitioners did present evidence from which the Board could have found that the tower would not pose an unreasonable or unjustifiable safety hazard, there was also substantial evidence to support the Board’s findings that the tower would be a safety hazard. We therefore affirm the order of the superior court.

AFFIRMED.

Judges McCULLOUGH and BRYANT concur.

STATE v. SPEIGHT

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STATE OF NORTH CAROLINA v. TIMMY WAYNE SPEIGHT

No. COA03-776-2

(Filed 18 September 2007)

1. Sentencing— aggravating factors—not submitted to jury—harmless error

Errors in not submitting aggravating factors to the jury when sentencing defendant for two counts of involuntary manslaughter arising from impaired driving were harmless. The evidence of knowingly creating a risk to more than one person with a hazardous device was overwhelming and uncontroverted, and the guilty verdicts on the two involuntary manslaughter charges necessarily show that defendant killed another in the course of conduct of each offense.

2. Sentencing— impaired driving—aggravating factors—not duplicative

Factors aggravating driving while impaired were not duplicative where the two factors were that defendant's impaired driving caused serious injury to another person and that defendant used a motor vehicle in the commission of a felony that led to the death of two people.

Upon remand from the Supreme Court of North Carolina, appeal by defendant from judgments entered 30 August 2002 by Judge W. Russell Duke, Jr., in Pitt County Superior Court. Originally heard in the Court of Appeals 30 March 2004.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Robert C. Montgomery, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Barbara S. Blackman, for defendant-appellant.

HUNTER, Judge.

This case comes before us on remand from the Supreme Court of North Carolina in order that we may reexamine the issue of sentencing in light of its recent decision in *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006), *cert. denied*, — U.S. —, 167 L. Ed. 2d 1114 (2007). Upon remand from the United States Supreme Court, our Supreme Court in *Blackwell* held that according to *Washington v.*

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Recuenco, 548 U.S. 212, 165 L. Ed. 2d 466 (2006), the failure to submit a sentencing factor to the jury is subject to harmless error review. *Blackwell*, 361 N.C. at 44, 638 S.E.2d at 455. As this case is now before us, we review the issue of whether the error in Timmy Wayne Speight's ("defendant") sentencing on two involuntary manslaughter convictions and a driving while intoxicated ("DWI") charge was harmless or whether defendant is entitled to a new sentencing hearing. After careful consideration, we find the error to be harmless.

The State's evidence tended to show that James and Leona Newsome were traveling north on Highway 11 during rush hour traffic. Mrs. Newsome warned her husband that defendant's car was approaching from behind at a high rate of speed. Mr. Newsome then saw defendant pass their vehicle in the right-hand lane, pick up speed, and cut in and out of traffic.

Carl Ebron was also traveling northbound on Highway 11. As Mr. Ebron proceeded through a stoplight, he heard tires squealing and saw defendant's red car cut in front of him, go out of control, start skidding, and hit a median. Defendant's vehicle then crossed the median, hit a pole, and crashed head-on into a white Buick heading southbound on Highway 11. The Buick was occupied by fifty-year-old Lynwood Thomas and his twenty-year-old son Donald Thomas ("victims"), both of whom died as a result of the collision.

Michelle Spade was standing in her front lawn at the time of the incident and so witnessed it. She testified that defendant's vehicle "was going every bit of 70/80 [miles per hour.]" The speed limit on the road was fifty-five (55) miles per hour. Ms. Spade added:

You can pretty much look down and see what's going on. I saw him. Mainly I just saw the car still going in and out, in and out. And it had been raining for a couple of days prior to this going on. So what he was doing was driving and he was trying actually [to] avoid hitting the other cars. So he went to the side then that is when he slid over.

Ms. Spade stated that after defendant's car went onto the median, it spun, then collided with the victims' vehicle, causing the Buick to fly into the air, flip over, and land on its roof. At this point, Ms. Spade called 911.

An EMS unit arrived at the scene after the 911 call. Donald Gerkin, a paramedic, testified that his three-person crew split up to assess the persons in both vehicles and that he went to assess the

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occupants of the Buick. Mr. Gerkin determined that neither victim was breathing or had a pulse.

Jeffrey Maye, another first responder, testified that as he was attempting to open defendant's car doors, he noticed the odor of alcohol in defendant's vehicle. Defendant was eventually removed and taken to the hospital.

Officer M.L. Montanye of the Greenville Police Department was also at the scene. While EMTs were working to remove defendant from his vehicle, Officer Montanye put his head in one of the windows broken out by the crash and smelled a slight odor of alcohol. Officer Montanye followed the ambulance to the hospital in order to obtain a chemical test.

At the hospital, Officer Montanye spoke with defendant and later testified that he noticed a moderate odor of alcohol coming from his breath. Based upon that, the severity of the collision, and the statements of the four witnesses with whom he spoke, Officer Montanye was of the opinion that defendant had consumed a sufficient amount of alcohol to appreciably impair his mental and physical faculties and therefore charged defendant with DWI. Officer Montanye read defendant his chemical testing rights, and defendant signed a form acknowledging that he understood his rights. Defendant also signed a consent granting permission for blood samples to be taken. Later, defendant signed a consent form releasing all of his medical records from Pitt Memorial Hospital to the district attorney's office.

The blood sample was turned over to the State Bureau of Investigation ("SBI") for analysis. At trial, Special Agent Aaron Jonich testified that after performing his analysis, he determined that defendant's alcohol concentration was 0.10 at the time of the test. Agent Jonich also stated that the drug analysis he performed revealed the presence of morphine and tetrahydrocannabinol ("THC"). THC is a chemical found in marijuana.

Paul Glover of the Forensic Tests for Alcohol Branch testified that he performed a retrograde extrapolation on both the SBI blood test results and the hospital blood results. The results of both tests indicate that, at the time of the collision, defendant's blood alcohol concentration was 0.13.

Defendant was found guilty of two counts of involuntary manslaughter and one count of DWI. The trial court found two aggravating factors as to each involuntary manslaughter: (1) "defendant

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knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person”; and (2) “in the course of conduct, the defendant killed another[.]” The trial court found that the aggravating factors outweighed the mitigating factors and sentenced defendant to two consecutive prison terms of twenty to twenty-four months.

As to the DWI conviction, the trial court found two aggravating factors: (1) defendant “caused, by the defendant’s impaired driving at the time of the current offense, serious injury to another person”; and (2) “defendant used a motor vehicle in the commission of a felony that led to the death of two people.” The trial court sentenced defendant to twelve months imprisonment to run consecutively with the sentence imposed in the second of the two manslaughter convictions.

The trial court erred by not submitting the aggravating factors to the jury under *Blakely v. Washington*, 542 U.S. 296, 301, 159 L. Ed. 2d 403, 412 (2004). Our Supreme Court, however, has recently determined that *Blakely* errors are subject to harmless error review. *Blackwell*, 361 N.C. at 44, 638 S.E.2d at 455. Thus, the issue before this Court is whether the *Blakely* errors committed by the trial court by finding aggravating factors were harmless beyond a reasonable doubt.

I.

[1] As stated, the trial court, by finding the aggravating factors in this case rather than submitting them to a jury for determination, committed a Sixth Amendment error pursuant to *Blakely*. See *Blakely*, 542 U.S. at 301, 159 L. Ed. 2d at 412 (“[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt”). In *Washington v. Recuenco*, 548 U.S. at 221-22, 165 L. Ed. 2d at 476, the United States Supreme Court held that *Blakely* errors are subject to harmless error review.

Pursuant to *Recuenco*, our Supreme Court has held that the Sixth Amendment error committed in North Carolina when a judge, rather than a jury, finds an aggravating factor is subject to harmless error review. *Blackwell*, 361 N.C. at 44, 638 S.E.2d at 455. The Court set out the following test to determine whether an error is harmless:

In conducting harmless error review, we must determine from the record whether the evidence against the defendant was so

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“overwhelming” and “uncontroverted” that any rational factfinder would have found the disputed aggravating factor beyond a reasonable doubt. The defendant may not avoid a conclusion that evidence of an aggravating factor is “uncontroverted” by merely raising an objection at trial. Instead, the defendant must “bring forth facts contesting the omitted element,” and must have “raised evidence sufficient to support a contrary finding.”

Id. at 49-50, 638 S.E.2d at 458 (internal citations omitted); *see also State v. Heard and Jones*, 285 N.C. 167, 172, 203 S.E.2d 826, 829 (1974) (“before a court can find a Constitutional error to be harmless it must be able to declare a belief that such error was harmless beyond a reasonable doubt”).

A.

The trial court imposed higher sentences for each of the two involuntary manslaughter¹ convictions based on its finding of two aggravating factors: (1) “defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person[.]” N.C. Gen. Stat. § 15A-1340.16(d)(8) (2005); and (2) in the course of his conduct, defendant killed another. We now must address whether the State proved these aggravating factors beyond a reasonable doubt, rendering the trial court’s *Blakely* error harmless.

Defendant argues that the finding of the first factor was not established beyond a reasonable doubt. We disagree.

To prove the first aggravating factor found by the trial court, the State must show: (1) “the weapon [or device] in its normal use is hazardous to the lives of more than one person; and (2) . . . a great risk of death was knowingly created.” *State v. Rose*, 327 N.C. 599, 605, 398 S.E.2d 314, 317 (1990).

As to whether a vehicle is hazardous to the lives of more than one person “[i]t is well settled in North Carolina that an automobile can be a deadly weapon if it is driven in a reckless or dangerous manner.” *State v. Jones*, 353 N.C. 159, 164, 538 S.E.2d 917, 922 (2000). There being overwhelming and uncontradicted evidence that defendant was

1. “Involuntary manslaughter is the unintentional killing of a human being without malice, proximately caused by (1) an unlawful act not amounting to a felony or naturally dangerous to human life, or (2) a culpably negligent act or omission.” *State v. Evangelista*, 319 N.C. 152, 165, 353 S.E.2d 375, 384 (1987).

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operating his vehicle in a reckless manner by driving at a high rate of speed, by driving while intoxicated and with THC and morphine present in his blood, and by weaving in and out of traffic, we find that the first element of proof was conclusively established at the trial court. In other words, defendant's vehicle qualifies as "a weapon or device [that in its normal use is] hazardous to the lives of more than one person." N.C. Gen. Stat. § 15A-1340.16(d)(8).

As to whether a great risk of death to more than one person was knowingly created, it is sufficient to show that a reasonable person would have known his conduct created such risk. *See State v. Carver*, 319 N.C. 665, 667, 356 S.E.2d 349, 351 (1987) (holding that any reasonable person should know firing a rifle several times into a crowd of people creates a great risk of death). This Court has held that "any reasonable person should know that an automobile operated by a legally intoxicated driver is reasonably likely to cause death to any and all persons who may find themselves in the automobile's path." *State v. McBride*, 118 N.C. App. 316, 319-20, 454 S.E.2d 840, 842 (1995); *see also State v. Fuller*, 138 N.C. App. 481, 488, 531 S.E.2d 861, 866-67 (holding evidence of the aggravating factor was sufficient where motor vehicle collision was caused by the impaired defendant), *disc. review denied*, 353 N.C. 271, 546 S.E.2d 120 (2000). Here, we find that the State put on evidence before the jury that established beyond a reasonable doubt that a reasonable person would have known that a great risk of death had been created.

As to the second element of the first aggravating factor, that a great risk of death was knowingly created, the following uncontroverted evidence was presented: Defendant's blood alcohol concentration was 0.10 two hours after the collision; defendant's blood alcohol concentration would have been 0.13 at the time of the accident; defendant had morphine and THC in his system; defendant was speeding, lost control of his vehicle, skidded across a median where he hit a pole, and then crashed head-on into the victims' vehicle; and, per the testimony of three witnesses, defendant was driving at a high rate of speed in heavy traffic. The fact that defendant might have stopped for traffic signals or that other vehicles were going at a similar speed does nothing to contradict the evidence that at the time of the crash, defendant was traveling at a high rate of speed, after drinking, and through heavy traffic. Accordingly, because the evidence supporting the aggravating factor was overwhelming and uncontroverted, there can be no question that a rational jury would have found that defendant knowingly created a great risk of death to more than

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one person by means of a weapon or device that would normally be hazardous to more than one person.

As to the second aggravating factor, that defendant killed another, defendant acknowledges that the jury's guilty verdicts as to two involuntary manslaughter charges necessarily shows it found beyond a reasonable doubt that in the course of conduct as to each offense defendant killed another. The general rule is that "[e]vidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation[.]" N.C. Gen. Stat. § 15A-1340.16(d). Here, however, there were two involuntary manslaughter convictions. Accordingly, the trial court did not err because "[e]vidence used to prove an element of one offense may also be used to support an aggravating factor of a separate joined offense." *State v. Crockett*, 138 N.C. App. 109, 119, 530 S.E.2d 359, 365 (2000) (citing *State v. Farlow*, 336 N.C. 534, 444 S.E.2d 913 (1994)). Thus, we find the errors committed by the trial court in not submitting the aggravating factors to the jury for determination to be harmless.

B.

[2] Finally, defendant raises an issue in addition to the one this Court has directed the parties to address: That the two aggravating factors are duplicative. While this is not what the parties were asked to address in their briefs, the issue goes to whether the error committed by the trial court was harmless. Accordingly, we address this issue.

Evidence supporting "two aggravating factors may partially overlap, as long as there is some distinction in the evidence supporting each aggravating factor." *State v. Beck*, 359 N.C. 611, 616, 614 S.E.2d 274, 278 (2005). The evidence supporting the aggravating factors in the instant case has "some distinction." The first aggravating factor requires evidence that defendant was impaired, while the second does not. Furthermore, the second aggravating factor requires evidence that defendant committed a felony, while the first does not. We thus hold that the aggravating factors in this case are not duplicative.

The trial court found two aggravating factors as to defendant's conviction for driving while impaired: (1) that defendant "caused, by [his] impaired driving at the time of the current offense, serious injury to another person"; and (2) that defendant "used a motor vehicle in the commission of a felony that led to the death of two people."

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For the reasons stated in subsection A above, we also conclude that the evidence supporting the aggravating factors found as to the DWI is overwhelming and uncontroverted. Accordingly, the error committed by the trial court was harmless.

II.

In summation, we hold that the *Blakely* errors committed by the trial court were harmless and that the aggravating factors were not duplicative. Defendant's arguments to the contrary are rejected.

Harmless error.

Judges WYNN and TYSON concur.

STATE OF NORTH CAROLINA v. RUSSELL ANTOINE COOPER, DEFENDANT

No. COA06-1356

(Filed 18 September 2007)

Search and Seizure— frisk of black male—mere generalized suspicion

The trial court erred by denying defendant's motion to suppress evidence from a frisk which led to a conviction for aiding and abetting an armed robbery of a convenience store. It cannot be concluded, under all the circumstances, that the officer had more than a hunch or generalized suspicion; upholding the decision below would be holding, in effect, that the police could stop any black male found within a quarter of a mile of a robbery in the time immediately after a robbery committed by a black male.

Appeal by defendant from judgment entered 8 December 2005 by Judge Donald M. Jacobs in Wake County Superior Court. Heard in the Court of Appeals 9 May 2007.

Attorney General Roy Cooper, by Assistant Attorney General David L. Elliott, for the State.

Brannon Strickland, PLLC, by Anthony M. Brannon, for defendant-appellant.

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GEER, Judge.

Defendant Russell Antoine Cooper appeals from his conviction of robbery with a firearm. His sole argument on appeal is that the trial court erred in denying his motion to suppress evidence seized from his person during a warrantless search. Defendant was stopped and frisked by a Raleigh police officer shortly after an armed robbery at a nearby convenience store. Defendant contends that the officer lacked reasonable articulable suspicion of criminal activity, and, therefore, the stop and frisk did not fall within *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968).

More specifically, defendant asserts: “A black man walking in the vicinity of a store robbery is not suspicious behavior, without something else.” Because we agree that the totality of the circumstances known to the officer could, at best, only give rise to a generalized suspicion of criminal activity, the stop and frisk in this case was not justified by *Terry*. Accordingly, we hold that the trial court erred in denying the motion to suppress.

Standard of Review

In reviewing the denial of a motion to suppress, we determine whether the trial court’s findings of fact are supported by competent evidence and whether those findings in turn support the trial court’s conclusions of law. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Findings of fact are “conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.” *State v. Eason*, 336 N.C. 730, 745, 445 S.E.2d 917, 926 (1994), *cert. denied*, 513 U.S. 1096, 130 L. Ed. 2d 661, 115 S. Ct. 764 (1995). Defendant, in this case, does not challenge the findings of fact on appeal, and they are, therefore, binding. *State v. Carter*, 184 N.C. App. 706, 711, 646 S.E.2d 846, 850 (2007) (“Here, defendant has not assigned error to any of the findings of fact in the trial court’s ruling, and, consequently, those findings are binding on appeal.”).

Facts

The trial court made the following findings of fact following the suppression hearing. In the late afternoon on 17 April 2005, Officer A.B. Smith, a Raleigh police officer, was traveling south on Capital Boulevard when he heard a report over his radio that an armed robbery had taken place at a convenience store in Mini City. The robber was described as a black male. Officer Smith also heard

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over his radio that another officer had seen a black male walking on Lake Ridge Drive shortly after the robbery.

Officer Smith turned onto Deanna Drive to begin a sweep of the area in hopes of locating an individual meeting the description of the robber. The robber had reportedly left the rear of the store, heading in the general direction of the area that Officer Smith was searching. The officer knew that there was a path running approximately from the store through woods to Lake Ridge Drive. Officer Smith approached the intersection of Deanna Drive and Lake Ridge Drive approximately five minutes after the robbery.

At that time, Officer Smith saw a black male near where the path exited onto Lake Ridge Drive. From the time Officer Smith turned off Capital Boulevard until this point, the officer had seen no one else. He drove close to the black male—who was defendant—and motioned to him to approach the car. In response, defendant walked over to the car. For the purpose of obtaining information relating to the robbery, Officer Smith asked defendant to place his hands on the top of the patrol car. After defendant did so, Officer Smith began to frisk defendant and found a concealed handgun. He then arrested defendant for carrying a concealed weapon. The frisk took place five to 10 minutes after the robbery and a quarter of a mile away from the location of the robbery.

Although the trial court made no further findings of fact, the State's evidence tended to show the following. After arresting defendant, Officer Smith took defendant to the Mini City convenience store for a "show up." The cashier did not recognize defendant as the robber. Following the "show up," defendant was taken to the Raleigh Police Department's District 23 Substation for questioning. Defendant ultimately confessed that he had met Markell Baltimore in the woods and lent Baltimore his gun to commit the Mini City convenience store robbery. After Baltimore robbed the store, he again met defendant in the woods. Baltimore returned the gun to defendant and gave him some of the money he robbed from the store.

On 2 May 2005, defendant was indicted with aiding and abetting Baltimore's armed robbery. Defendant was tried on 5 December 2005 in Wake County Superior Court. During the trial, defendant moved to suppress evidence seized from his person during the stop and frisk at the intersection of Lake Ridge Drive and Deanna Drive. The trial court denied defendant's motion, concluding that Officer Smith stopped defendant "based on articulable, reasonable[] suspicion" and

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that the frisk occurred for the officer's safety. The jury found defendant guilty, and the trial court sentenced him to a presumptive range term of 57 to 78 months imprisonment. Defendant timely appealed to this Court.

Discussion

Defendant's sole argument on appeal is that the trial court erred in denying his motion to suppress. Since defendant does not challenge the trial court's findings of fact, the question before this Court is whether those findings support the trial court's conclusion that Officer Smith had a reasonable articulable suspicion sufficient to justify an investigatory stop and frisk under *Terry*.

As this Court recently stated, *Terry* established that "[a] police officer may effect a brief investigatory seizure of an individual where the officer has reasonable, articulable suspicion that a crime may be underway." *State v. Barnard*, 184 N.C. App. 25, 29, 645 S.E.2d 780, 783 (2007). Whether an officer had sufficient reasonable suspicion to make an investigatory stop is determined based on the totality of the circumstances. *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994). In conducting this review, we must bear in mind that:

[t]he stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. The only requirement is a minimal level of objective justification, something more than an "unparticularized suspicion or hunch."

Id. at 441-42, 446 S.E.2d at 70 (internal citations omitted) (quoting *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10, 109 S. Ct. 1581, 1585 (1989)).

We note that neither defendant's brief nor the State's brief are particularly helpful since both cite only to cases involving generalized discussions of the standards rather than to cases applying those standards to circumstances similar to those involved in this case. We start our discussion with *State v. Fleming*, 106 N.C. App. 165, 415 S.E.2d 782 (1992), frequently cited by defendants because this Court concluded, in that case, that the officer lacked reasonable articulable suspicion.

In *Fleming*, this Court addressed a stop and frisk that occurred at 12:10 a.m. in an area in which drugs were sold on a daily basis.

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During the frisk, the defendant was found to have crack cocaine on his person. This Court set out the following pertinent circumstances:

In the case now before us, at the time Officer Williams first observed defendant and his companion, they were merely standing in an open area between two apartment buildings. At this point, they were just watching the group of officers standing on the street and talking. The officer observed no overt act by defendant at this time nor any contact between defendant and his companion. Next, the officer observed the two men *walk* between two buildings, out of the open area, toward Rugby Street and then begin *walking* down the public sidewalk in front of the apartments.

Id. at 170, 415 S.E.2d at 785. The Court concluded, based on these facts, that the officer who stopped and searched the defendant “had only a generalized suspicion that the defendant was engaged in criminal activity, based upon the time, place, and the officer’s knowledge that defendant was unfamiliar to the area.” *Id.* at 171, 415 S.E.2d at 785.

The Court further observed:

Should these factors be found sufficient to justify the seizure of this defendant, such factors could obviously justify the seizure of innocent citizens unfamiliar to the observing officer, who, late at night, happen to be seen standing in an open area of a housing project or walking down a public sidewalk in a “high drug area.” This would not be reasonable.

Id., 415 S.E.2d at 785-86. The Court, therefore, concluded:

Considering the facts relied upon by the officer, together with the rational inferences which the officer was entitled to draw therefrom, we conclude they were inadequate to support the trial court’s conclusion that Officer Williams had a reasonable articulable suspicion that defendant was engaged in criminal activity. *Were we to conclude otherwise, we would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches which the Fourth Amendment is specifically designed to protect against.*

Id., 415 S.E.2d at 786 (emphasis added).

This Court subsequently relied upon *Fleming* in *State v. Rhyne*, 124 N.C. App. 84, 478 S.E.2d 789 (1996), in which a *Terry* search had

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also revealed drugs in the defendant's possession. In *Rhyne*, however, officers had actually received "an anonymous tip that several men were dealing drugs in the breezeway in which the defendant was sitting." *Id.* at 90, 478 S.E.2d at 792. When officers arrived at the location, they found the defendant sitting on the steps of the breezeway, which officers knew was outside his apartment building; he did not leave, but rather cooperated generally with the officers. *Id.* The Court observed that "[o]ther than being nervous, [the defendant] exhibited no other behavior that would indicate that he was engaged in criminal activity." *Id.*

Although this Court acknowledged that the anonymous tip distinguished *Fleming*, this Court concluded:

In light of the totality of circumstances, we conclude that this pat-down search was not justified. The anonymous tip referred simply to several black men located in the apartment complex breezeway; it was not specific to defendant. Furthermore, although defendant was in an area known for drug activity, this area was also his residence, a fact known to the officer prior to the search. When questioned, defendant was cooperative and did not flee the scene. He was wearing a jersey and shorts neither of which could easily conceal a weapon. In fact, when asked if he had a weapon, defendant lifted his shirt to show that he did not. Defendant also did not make any sudden or suspicious gestures which would suggest that he had a weapon.

Id. at 90-91, 478 S.E.2d at 793. The Court, therefore, concluded that "[t]his pat-down search was an unreasonable intrusion upon defendant's Fourth Amendment right to personal security and privacy," and "[t]he trial court erred in denying defendant's motion to suppress the evidence thereby obtained." *Id.* at 91, 478 S.E.2d at 793.

Most recently, this Court found *Fleming* analogous in *In re J.L.B.M.*, 176 N.C. App. 613, 627 S.E.2d 239 (2006). In *J.L.B.M.*, a dispatch reported a "suspicious person described as a Hispanic male." *Id.* at 620, 627 S.E.2d at 244. The description included no information regarding age, height, weight, other physical characteristics, or clothing. *Id.* The officer, who stopped and frisked the juvenile, "did not observe the juvenile committing any criminal acts, nor had there been other reports of any criminal activity in the area that day." *Id.* at 621, 627 S.E.2d at 244. In addition, the juvenile was stopped at approximately 6:00 p.m. on a summer evening in front of an open business. *Id.*

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The Court reasoned: “Even viewed through the eyes of a reasonable, cautious officer, the facts relied on by Officer Henderson are inadequate to show more than an unparticularized suspicion or hunch that the juvenile was involved in criminal activity.” *Id.* at 621-22, 627 S.E.2d at 245 (internal citation omitted). The Court stated further:

We hold that in the present case, like in *Fleming*, the stop was unjustified. Officer Henderson relied solely on the dispatch that there was a suspicious person at the Exxon gas station, that the juvenile matched the “Hispanic male” description of the suspicious person, that the juvenile was wearing baggy clothes, and that the juvenile chose to walk away from the patrol car. Officer Henderson was not aware of any graffiti or property damage before he stopped the juvenile, and he testified that he noticed the bulge in the juvenile’s pocket after he stopped the juvenile.

Id. at 622, 627 S.E.2d at 245. As a result, the Court held that the trial court erred in denying the juvenile’s motion to suppress. *Id.*

As *J.L.B.M.* suggested, some cases have found reasonable articulable suspicion for a stop and frisk when there was a report that a crime occurred nearby and circumstances relating to the defendant matched the report. In *State v. Thompson*, 296 N.C. 703, 707, 252 S.E.2d 776, 779, *cert. denied*, 444 U.S. 907, 62 L. Ed. 2d 143, 100 S. Ct. 220 (1979), our Supreme Court held that circumstances supporting reasonable suspicion for an investigatory stop of a van included the officers’ knowledge of recent break-ins in the vicinity involving a van; the van’s being parked at 12:30 a.m. in a public parking area in an isolated part of New Hanover County; and the occupants’ engaging in considerable activity around the van. Similarly, in *State v. Williams*, 87 N.C. App. 261, 264, 360 S.E.2d 500, 502 (1987), this Court affirmed the denial of a motion to suppress when (1) officers received a report of a burglary involving four black males; (2) 20 minutes after the burglary, they spotted a car containing four black males within 200 to 400 yards of the site of the burglary; and (3) some of the stolen property had been found in a field between the burglarized home and the car’s location. *See also In re Whitley*, 122 N.C. App. 290, 292, 468 S.E.2d 610, 612 (reasonable suspicion existed when police received telephone call reporting that two black males were selling drugs on Merrick Street, police found defendant and another black male at that location, and defendant exhibited “nervous body reflexes”), *disc. review denied*, 344 N.C. 437, 476 S.E.2d 132 (1996).

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Although, in this case, Officer Smith had received a report of an armed robbery about a quarter of a mile away, we believe this case more closely resembles *Fleming*, *Rhyne*, and *J.B.L.M.* than *Thompson*, *Williams*, and *Whitley*. Indeed, this case is materially indistinguishable from *Rhyne*.

The report indicated only that a black male had committed the armed robbery—a description that fits a substantial percentage of our population. There was no further description as to age, physical characteristics, or clothing. In contrast, in *Williams*, the report specified four black males, while in *Whitley*, the call had referred to two black males at a particular location.

In this case, defendant was simply walking down a public street in April at 6:30 p.m. Officer Smith did not observe defendant engaging in any suspicious behavior or mannerisms, and defendant cooperated fully. Moreover, defendant did not appear nervous when approached by Officer Smith. In *Thompson*, *Williams*, and *Whitley*, the parties were stopped late at night. In *Thompson*, the van was in a suspicious location and the parties were engaged in suspicious behavior. In *Whitley*, the defendant was obviously nervous.

The State relies significantly on the fact that there was a path in defendant's vicinity that led to the area near the convenience store. Officer Smith, however, had no information suggesting that defendant had been on that path or any facts that could be construed as indicating defendant was coming from that path. Further, Officer Smith could not even say that the robber had fled the store in the general direction of the path. By way of contrast, in *Williams*, before stopping the four men, officers had found some of the stolen goods in a field that lay directly between the robbed house and where the men were found in their car.

In this case, we cannot conclude, under all the circumstances, that Officer Smith had more than a hunch or a generalized suspicion. If we were to uphold the decision below, then we would, in effect, be holding that police, in the time frame immediately following a robbery committed by a black male, could stop any black male found within a quarter of a mile of the robbery. As this Court stated in *Fleming*, “[t]his would not be reasonable.” 106 N.C. App. at 171, 415 S.E.2d at 786.

We, therefore, hold that the trial court erred in denying defendant's motion to suppress the evidence obtained from his person dur-

IN RE B.D.N.

[186 N.C. App. 108 (2007)]

ing the *Terry* frisk. Although defendant recites the law regarding the fruit of the poisonous tree, *see State v. Pope*, 333 N.C. 106, 113-14, 423 S.E.2d 740, 744 (1992), he does not specifically apply that doctrine to this case, but instead asks the Court to “vacate the judgment against Mr. Cooper, reverse the trial court’s order denying the motion to suppress, and remand to the trial court with instructions to grant the motion to suppress and for further proceedings.” We, therefore, do not address whether the “fruit of the poisonous tree” doctrine requires dismissal of the charge against defendant. We reverse the judgment below and remand for further proceedings.

Reversed and remanded.

Judges HUNTER and ELMORE concur.

IN THE MATTER OF: B.D.N.

No. COA07-44

(Filed 18 September 2007)

1. Juveniles— delinquency—making false bomb threat at school—sufficiency of evidence

The trial court did not err by denying respondent juvenile’s motion to dismiss a juvenile delinquency petition based on a violation of N.C.G.S. § 14-69.1(a) for making a false bomb threat at a school, because there was substantial evidence of each element of the offense and of the juvenile being the perpetrator including: (1) a teacher stated the juvenile should have been the last student to use the pertinent calculator prior to another student finding the message on 8 May 2006; (2) two students testified they saw the words “Bomb at Lunch” on the pertinent calculator; (3) a student testified that a few days after the bomb threat she heard the juvenile say that she meant it as a prank and that she did not think they would take it seriously; and (4) another student testified that a day after the bomb threat, she heard the juvenile tell another student that the reason the juvenile did the bomb threat was based on the fact that she thought it would be fun to get out of school.

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2. Juveniles—delinquency—making false bomb threat at school—motion to dismiss—proper statute—plain error analysis

Although a juvenile contends the trial court committed plain error by denying her motion to dismiss based on an alleged improper conviction under N.C.G.S. § 14-69.1(a) for making a false bomb threat at a school even though she contends she should have been charged under N.C.G.S. § 14-69.1(c) which deals specifically with public buildings, this assignment of error is dismissed because: (1) our Supreme Court has applied the plain error rule only to issues relating to jury instructions or the admissibility of evidence; and (2) this issue does not fall within these categories.

3. Jurisdiction—subject matter—making false bomb threat at a school—proper statute

The trial court did not lack subject matter jurisdiction in a juvenile delinquency case based on the making of a false bomb threat at a school even though the juvenile contends she was improperly charged, tried, and convicted under N.C.G.S. § 14.69.1(a), which applies to any building, rather than N.C.G.S. § 14.69.1(c), which applies to any public building, because: (1) there was substantial evidence of every element of making a false report concerning a destructive device under N.C.G.S. § 14.69.1(a); (2) although N.C.G.S. § 14.69.1(c) specifically defines the offense of making a false report concerning a destructive device with respect to a public building, the State was not required to charge the juvenile under this subsection of the statute; (3) “any building,” as used in N.C.G.S. § 14.69.1(a), includes a public building or a school building; (4) the General Assembly only intended to provide for a tougher penalty in the case of successive violations when it enacted the separate offense under N.C.G.S. § 14.69.1(c); and (4) although the juvenile contends that the more direct and specific statute applies where one of two statutes might apply to the same situation, our Supreme Court has employed this principle in determining which statute of limitations provision applied, and the juvenile has not cited any decision in which this principle was applied in a situation analogous to the present case.

Appeal by Respondent from orders entered 22 August 2006 by Judge Paul A. Hardison in District Court, Onslow County. Heard in the Court of Appeals 29 August 2007.

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Attorney General Roy Cooper, by Assistant Attorney General Rebecca E. Lem, for the State.

McCotter, Ashton & Smith, P.A., by Rudolph A. Ashton, III and Terri W. Sharp, for Respondent.

McGEE, Judge.

A juvenile petition was filed on 17 May 2006 charging B.D.N. with

communicat[ing] a report by typing ‘Bomb at Lunch’ on a Texas Instruments TI-83 Plus Calculator to Swansboro Middle School knowing or having reason to know the report to be false, that there was located in a school a device designed to destroy or damage the building by explosion in violation of [N.C. Gen. Stat. §] 14-69.1(a).

At a hearing, E.P., a student at Swansboro Middle School, testified that she went to her math class on 8 May 2006, got a calculator, and sat down. When she turned on the calculator, she saw the words “Bomb at Lunch” displayed on the calculator. E.P. raised her hand and told her teacher, Myra Hager (Ms. Hager), that she needed to show her something on the calculator. Ms. Hager told E.P. not to disrupt class, and Ms. Hager did not look at the calculator. After the math class, E.P. told her social studies teacher, Katie Bolinger (Ms. Bolinger), what she had seen on the calculator. Ms. Bolinger went to look at the calculator and then discussed the situation with Ms. Hager. E.P. also testified that during the math class, she showed the calculator to another student, B.G. B.G. testified that she was in math class with E.P. on 8 May 2006 and saw the words “Bomb at Lunch” on the calculator E.P. was using.

Ms. Hager testified she was a teacher at Swansboro Middle School, and that during her first period math class on 8 May 2006, E.P. asked to show Ms. Hager something on her calculator. Ms. Hager told E.P. to put the calculator away because the class was not going to use calculators. However, after the math class was over, Ms. Bolinger and E.P. came to Ms. Hager’s class and showed Ms. Hager the calculator that E.P. had been using. Ms. Hager saw the words “Bomb at Lunch” displayed on the calculator and took the calculator to the office.

Ms. Hager testified that the calculators hung on a wall in her classroom and that each student was assigned to a calculator. Ms. Hager said that E.P. was assigned to calculator fourteen for first period, B.D.N. was assigned to calculator fourteen for second period,

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and another student, who had been absent the previous Friday, was assigned to the same calculator for third period. Ms. Hager further testified that the students had used the calculators to take a test on the previous Friday, 5 May 2006. Ms. Hager also testified that other students had used calculators to take a make-up test before first period on 8 May 2006, but she did not recall that any of those students used calculator fourteen.

Ms. Bolinger testified that E.P. came to Ms. Bolinger's second period class on 8 May 2006 and said she needed to show Ms. Bolinger something on a calculator. Ms. Bolinger went with E.P. to Ms. Hager's class and saw the words "Bomb at Lunch" on the calculator that E.P. showed her. Ms. Bolinger testified that she reported this to the office.

Christine Andrea (Ms. Andrea) testified that she was the principal of Swansboro Middle School on 8 May 2006. She was not on campus at the time of the incident, but she was notified by phone and returned to school. Ms. Andrea saw the words "Bomb at Lunch" on the calculator. She interviewed several students including E.P., B.D.N., and B.G. When no one stated that the calculator incident was a prank, Ms. Andrea evacuated the school.

C.J. testified she was a student at Swansboro Middle School. A few days after the bomb threat, she heard B.D.N. tell someone that B.D.N. "meant it all as a prank, and [B.D.N.] didn't think they'd take it actual [sic] seriously."

S.B. testified she was a student at Swansboro Middle School and that a day after the bomb threat, she heard B.D.N. tell another student, M.C., that "[t]he reason [B.D.N.] did the bomb threat was [be]cause [B.D.N.] thought it would be fun to get out of school."

At the close of the evidence, B.D.N. moved to dismiss the petition, and the trial court denied the motion. The trial court adjudicated B.D.N. a delinquent juvenile on 22 August 2006 for violation of N.C. Gen. Stat. § 14-69.1(a). The trial court also entered a disposition order that, *inter alia*, placed B.D.N. on probation for twelve months. B.D.N. appeals.

I.

[1] B.D.N. argues the trial court erred by denying her motion to dismiss the petition for insufficiency of the evidence. In reviewing a motion to dismiss a juvenile petition, the evidence must be considered in the light most favorable to the State, which is entitled to every

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reasonable inference that may be drawn from the evidence. *In re Brown*, 150 N.C. App. 127, 129, 562 S.E.2d 583, 585 (2002). “[I]n order to withstand a motion to dismiss the charges contained in a juvenile petition, there must be substantial evidence of each of the material elements of the offense charged.” *In re Bass*, 77 N.C. App. 110, 115, 334 S.E.2d 779, 782 (1985). “‘[T]he rule for determining the sufficiency of evidence is the same whether the evidence is completely circumstantial, completely direct, or both.’” *State v. Crouse*, 169 N.C. App. 382, 389, 610 S.E.2d 454, 459 (quoting *State v. Wright*, 302 N.C. 122, 126, 273 S.E.2d 699, 703 (1981)), *disc. review denied*, 359 N.C. 637, 616 S.E.2d 923 (2005).

N.C. Gen. Stat. § 14-69.1(a) (2005) states:

Except as provided in subsection (c) of this section, any person who, by any means of communication to any person or group of persons, makes a report, knowing or having reason to know the report is false, that there is located in or in sufficient proximity to cause damage to any building . . . any device designed to destroy or damage the building . . . by explosion, blasting or burning, is guilty of a Class H felony.

The elements of this offense relevant to the present case are that B.D.N. (1) reported by any means of communication to any person or group of persons that a bomb was located in a building, (2) that this report was false, and (3) that B.D.N. knew or had reason to know that the report was false. *See* N.C.G.S. § 14-69.1(a); N.C.P.I.—Crim. 215.85 (2006).

B.D.N. argues that no witnesses testified that they saw her type the words “Bomb at Lunch” into the calculator. However, despite this contention, we hold there was substantial evidence of each element of the offense and of B.D.N.’s being the perpetrator. According to Ms. Hager, B.D.N. should have been the last student to use calculator fourteen prior to E.P. finding the message on 8 May 2006. Two students, E.P. and B.G., testified they saw the words “Bomb at Lunch” on the calculator E.P. was using on 8 May 2006. Ms. Hager, Ms. Bolinger, and Ms. Andrea also testified they saw the message “Bomb at Lunch” on the calculator on 8 May 2006. C.J. testified that a few days after the bomb threat, she heard B.D.N. say that she “meant it all as a prank, and [B.D.N.] didn’t think they’d take it actual [sic] seriously.” S.B. testified that a day after the bomb threat, she heard B.D.N. tell another student, M.C., that “[t]he reason [B.D.N.] did the bomb threat was [be]cause [B.D.N.] thought it would be fun to get out of school.” We

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hold this was substantial evidence of each element of the offense and of B.D.N.'s being the perpetrator.

B.D.N. attempts to challenge the credibility of several witnesses. However, in reviewing a motion to dismiss, a "trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility." *State v. Parker*, 354 N.C. 268, 278, 553 S.E.2d 885, 894 (2001), *cert. denied*, *Parker v. North Carolina*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002). We overrule this assignment of error.

II.

[2] B.D.N. next argues the trial court committed plain error by denying her motion to dismiss because she was improperly charged and convicted under N.C.G.S. § 14-69.1(a). Specifically, she argues that the appropriate statute under which she should have been charged is N.C. Gen. Stat. § 14-69.1(c), which deals specifically with public buildings. However, our Supreme Court has applied the plain error rule only to issues relating to jury instructions or the admissibility of evidence. *State v. Atkins*, 349 N.C. 62, 81, 505 S.E.2d 97, 109-10 (1998), *cert. denied*, *Atkins v. North Carolina*, 526 U.S. 1147, 143 L. Ed. 2d 1036 (1999). Because the issue B.D.N. attempts to raise does not fall within these categories, this assignment of error is procedurally barred and without merit.

III.

[3] B.D.N. argues that "judgment should be arrested because [B.D.N.] was charged, tried, and convicted under the wrong statute for an offense involving a school." Specifically, B.D.N. argues that because she was charged under the wrong statute, the trial court lacked subject matter jurisdiction. "When a petition is fatally deficient, it is inoperative and fails to evoke the jurisdiction of the court." *In re J.F.M.*, 168 N.C. App. 143, 150, 607 S.E.2d 304, 309, *disc. review denied*, 359 N.C. 411, 612 S.E.2d 320 (2005). "The question of subject matter jurisdiction may properly be raised for the first time on appeal." *State v. Jones*, 172 N.C. App. 161, 163, 615 S.E.2d 896, 897 (quoting *Bache Halsey Stuart, Inc. v. Hunsucker*, 38 N.C. App. 414, 421, 248 S.E.2d 567, 571 (1978), *disc. review denied*, 296 N.C. 583, 254 S.E.2d 32 (1979)), *disc. review denied*, 360 N.C. 72, 624 S.E.2d 365 (2005).

B.D.N. argues that she should have been charged under N.C. Gen. Stat. § 14-69.1(c), which applies to "any public building," rather than

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under N.C.G.S. § 14-69.1(a), which applies to “any building.” N.C. Gen. Stat. § 14-69.1(c) (2005) provides:

Any person who, by any means of communication to any person or groups of persons, makes a report, knowing or having reason to know the report is false, that there is located in or in sufficient proximity to cause damage to any public building any device designed to destroy or damage the public building by explosion, blasting, or burning, is guilty of a Class H felony. Any person who receives a second conviction for a violation of this subsection within five years of the first conviction for violation of this subsection is guilty of a Class G felony. For purposes of this subsection, “public building” means educational property as defined in G.S. 14-269.2(a)(1), a hospital as defined in G.S. 131E-76(3), a building housing only State, federal, or local government offices, or the offices of State, federal, or local government located in a building that is not exclusively occupied by the State, federal, or local government.

In support of her argument, B.D.N. cites *Jones*, where the defendant was an employee of a local Alcohol Beverage Control Board, who was charged with embezzlement under N.C. Gen. Stat. § 14-92, which governs embezzlement by a “‘public officer of any county, unit or agency of local government, or local board of education[.]’” *Jones*, 172 N.C. App. at 162-64, 615 S.E.2d at 896-98 (quoting N.C. Gen. Stat. § 14-92). Our Court held that the defendant was “not a public officer of any county, unit or agency of local government, or local board of education.” *Id.* at 165, 615 S.E.2d at 898. As a local ABC Board employee, the “defendant should have been charged under N.C. Gen. Stat. § 14-90.” *Id.* Therefore, because the defendant was charged under N.C.G.S. § 14-92, our Court held that the trial court lacked jurisdiction and vacated the trial court’s judgments. *Id.*

Jones is distinguishable from the present case. In the present case, as we have already held, there was substantial evidence of every element of making a false report concerning a destructive device under N.C.G.S. § 14-69.1(a). In contrast, in *Jones*, the State could not prove an essential element of the offense with which the defendant was charged—that the defendant was a public officer of any county, unit or agency of local government, or local board of education. Therefore, in *Jones*, the defendant was charged under the wrong statute, and the trial court lacked subject matter jurisdiction. Although N.C.G.S. § 14-69.1(c) specifically defines the offense of

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making a false report concerning a destructive device with respect to a public building, the State was not required to charge B.D.N. under this subsection of the statute. Clearly, “any building,” as used in N.C.G.S. § 14-69.1(a), includes a public building. Therefore, the State could have charged B.D.N. under either subsection. By enacting the separate offense under N.C.G.S. § 14-69.1(c), the General Assembly only intended to provide for a tougher penalty in the case of successive violations.

B.D.N. also relies upon *State v. Goodson*, 178 N.C. App. 557, 631 S.E.2d 842 (2006), where our Court recognized that

“[a]s with any other statute, the legislative intent controls the interpretation of a criminal statute. . . . We generally construe criminal statutes against the State. . . . However, ‘[t]he canon in favor of strict construction [of criminal statutes] is not an inexorable command to override common sense and evident statutory purpose. . . . Nor does it demand that a statute be given the “narrowest meaning”; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers.’ ”

Id. at 559, 631 S.E.2d at 843-44 (quoting *State v. Jones*, 358 N.C. 473, 477-78, 598 S.E.2d 125, 128 (2004) (internal citations omitted)). Our Court also stated: “But civil or criminal, ‘[w]hen the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning.’ ” *Id.* at 559, 631 S.E.2d at 844 (quoting *Lemons v. Old Hickory Council*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988)). Employing these principles, our Court held that a locked desk was not a “safe” or “vault” for purposes of the offense of safecracking. *Id.* at 558-60, 631 S.E.2d at 843-44. However, *Goodson* does not support B.D.N.’s position in the present case. Under the plain language of N.C.G.S. § 14-69.1(a), under which B.D.N. was charged, a school building, although a public building, would also qualify as “any building.”

B.D.N. further relies upon language from *Fowler v. Valencourt*, 334 N.C. 345, 435 S.E.2d 530 (1993), that “ ‘[w]here one of two statutes might apply to the same situation, the statute which deals more directly and specifically with the situation controls over the statute of more general applicability.’ ” *Id.* at 349, 435 S.E.2d at 532 (quoting *Trustees of Rowan Tech. v. Hammond Assoc.*, 313 N.C. 230, 238, 328 S.E.2d 274, 279 (1985)). However, in *Fowler*, our Supreme Court employed this principle in determining which statute of limitations provision applied to the plaintiff’s tort actions. *Id.* at 349-50, 435

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S.E.2d at 532-33. B.D.N. has not cited any decision in which this principle was applied in a situation analogous to the present case. For the reasons stated above, we overrule this assignment of error.

Affirmed.

Judges STEPHENS and SMITH concur.

STATE OF NORTH CAROLINA v. ERNEST LEE JUNIOR PETTIS

No. COA06-1380

(Filed 18 September 2007)

1. Rape; Sexual Offenses— sexual battery—not a lesser included offense of rape

The offense of sexual battery under N.C.G.S. § 14-27.5A(a)(2) is not a lesser included offense of second-degree rape under N.C.G.S. § 14-27.3(a)(2). Sexual battery has a purpose element that requires the act to be completed for sexual arousal, gratification, or abuse, which is not an element of second-degree rape.

2. Rape; Assault— assault on a female—not a lesser included offense of statutory rape

The trial court did not err by denying defendant's requested instruction on the offense of assault on a female as a lesser included offense of statutory rape. The crime of assault on a female requires proof of an assault, whereas statutory rape does not. Assault on a female requires proof that defendant is male, which is not required for statutory rape.

3. Appeal and Error— preservation of issues—no objection at trial—no assignment of error in brief

Defendant did not preserve for appeal the question of whether the trial court erred by admitting testimony about a DNA examination and report by a nontestifying SBI agent. Defendant not only did not object to the jury receiving the report during deliberations, he consented, and further, did not assign error in his brief.

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4. Constitutional Law— Confrontation Clause—testimony about DNA analysis—opinion based on tests by others

Defendant's Confrontation Clause rights were not violated when one SBI agent testified about a DNA analysis performed by another agent. It is well established that there is no violation when an expert bases an opinion on tests performed by others and defendant has the opportunity to cross-examine the testifying expert about the basis of his or her opinion. Although the agent was not formally tendered as an expert witness, he can still testify as an expert.

5. Evidence— statutory rape—defendant's age—booking statement—other testimony

Any error was harmless where the defendant's pre-Miranda warning booking statement about his age was admitted in a statutory rape prosecution. There was other testimony about defendant's age from his mother.

6. Constitutional Law— instructions—unanimity—no error

The trial court's instructions on unanimity in a statutory rape prosecution were not erroneous.

Appeal by defendant from judgment entered 28 February 2006 by Judge Nathaniel J. Poovey in Cleveland County Superior Court. Heard in the Court of Appeals 20 August 2007.

Attorney General Roy Cooper, by Assistant Attorney General Amy C. Kunstling, for the State.

Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for defendant appellant.

McCULLOUGH, Judge.

Defendant appeals a judgment entered after a jury verdict of guilty of two counts of statutory rape, one count of second-degree rape and one count of taking indecent liberties with a child. We determine there was no prejudicial error.

FACTS

Ernest Lee Junior Pettis ("defendant") was indicted for two counts of statutory rape, one count of second-degree rape, and one count of taking indecent liberties with a child. The State presented evidence at trial which tended to show the following:

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A.W. was born on 1 June 1990. In December 2003, she was living at the Above and Beyond group home in Kings Mountain. Above and Beyond is a Level III facility that provides twenty-four-hour supervision.

In December 2003, A.W. ran away from the group home and encountered defendant. Defendant told her to follow him, which she did. They went into the woods. After they had been talking in the woods for awhile, a man named Flinto picked up A.W. and defendant and took them to his house. At Flinto's house, A.W. had sex with Flinto because defendant told her that in order to stay at Flinto's house, A.W. had to have sex with Flinto.

From Flinto's house, A.W. and defendant went to Nancy Gladden's house, where they stayed for a couple of days. A.W. told defendant she was in the custody of DSS. She also told him she was fifteen or sixteen. A.W. testified that defendant told her he had a child her age. She also testified that defendant told her he was "twenty-something." A.W. and defendant had sex at Ms. Gladdens' house. A.W. estimated that she and defendant had sex there four to ten times. Defendant did not wear a condom. The police located A.W. at Ms. Gladden's home. Defendant, who hid in the basement, had told A.W. not to mention anything about him.

When the police returned A.W. to the group home, A.W. said she had been raped. A.W. testified at trial that she had sex with defendant because she wanted to, and defendant did not force her to have sex with him.

A.W. was taken to the Kings Mountain Hospital's emergency room for a rape kit exam. Nurse Audrey Baker examined A.W. A.W. told Nurse Baker she had run away from the group home and met a person she did not know. A.W. said she was taken to one place in Bessemer City and raped and then taken to another place in Kings Mountain and raped repeatedly over several days. Nurse Baker observed that A.W. had a brownish-yellowish bruise on her left breast. A.W.'s genital, vaginal, and rectal exam results were normal.

Hope Dorsey worked at the group home the night A.W. ran away. Ms. Dorsey testified that when she last saw A.W., A.W. was wearing gray jogging pants, a jacket, and shoes. A.W. was wearing a different outfit when the police brought her back to the group home. Kings Mountain police officers went to Nancy Gladden's house. Ms.

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Gladden consented to a search of the house. Captain Derek Johnson found a pair of gray jogging pants in the washing machine. There was no water in the washing machine, and the pants were not wet. Ms. Dorsey recognized the pants as being the pair A.W. was wearing when Ms. Dorsey last saw her before A.W. ran away. The gray pants were sent to the SBI lab for testing. Special Agent Jed Taub, who was received without objection as an expert in forensic serology, forensic DNA analysis, and forensic biology, testified that he found spermatozoa and semen and epithelial cells on the crotch of the pants. This was consistent with being vaginal drainage of a mixture of vaginal fluid and spermatozoa and semen. The predominant DNA profile obtained from the cutting from the crotch of the pants matched defendant's DNA profile.

A.W. identified defendant from a photo array, and subsequently, defendant was arrested. As part of the booking process, defendant told the arresting officer that his date of birth was 1 February 1969 and he was thirty-four years old.

William Boyd, who was born on 21 January 1959, testified that he goes by the name Flinto. Mr. Boyd said he had never seen A.W. prior to court, and he denied having sex with her. Mr. Boyd testified that defendant "might have brought a young lady over to the house." He said defendant and the girl were at his house for a few hours and were hugging. He said he then drove them to Monroe Avenue.

The jury found defendant guilty of two counts of statutory rape, one count of second-degree rape, and one count of taking indecent liberties with a child. Defendant appeals.

I.

[1] Defendant contends the trial court erred in denying his requested instruction on the offense of sexual battery because sexual battery is a lesser included offense of second-degree rape. We disagree.

The North Carolina Supreme Court has defined what a lesser included offense is as follows:

[T]he *definitions* accorded the crimes determine whether one offense is a lesser included offense of another crime. In other words, all of the essential elements of the lesser crime must also be essential elements included in the greater crime. If the lesser crime has an essential element which is not completely covered by the greater crime, it is not a lesser included offense.

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State v. Weaver, 306 N.C. 629, 635, 295 S.E.2d 375, 378-79 (1982) (citation omitted), *overruled in part on other grounds by State v. Collins*, 334 N.C. 54, 61, 431 S.E.2d 188, 193 (1993).

We determine the offense of sexual battery under N.C. Gen. Stat. § 14-27.5A(a)(2) (2005), is not a lesser included offense of second-degree rape under N.C. Gen. Stat. § 14-27.3(a)(2) (2005). Second-degree rape under N.C. Gen. Stat. § 14-27.3(a)(2) provides:

(a) A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person:

....

(2) Who is mentally disabled, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know the other person is mentally disabled, mentally incapacitated, or physically helpless.

Id. The sexual battery statute provides, in pertinent part:

(a) A person is guilty of sexual battery if the person, for the purpose of sexual arousal, sexual gratification, or sexual abuse, engages in sexual contact with another person:

....

(2) Who is mentally disabled, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know that the other person is mentally disabled, mentally incapacitated, or physically helpless.

N.C. Gen. Stat. § 14-27.5A(a)(2) (2005). Therefore, the offense of sexual battery under N.C. Gen. Stat. § 14-27.5A(a)(2) has a purpose element, requiring the act be completed for the purpose of sexual arousal, sexual gratification, or sexual abuse that is not an element of second-degree rape under N.C. Gen. Stat. § 14-27.3(a)(2). Accordingly, sexual battery under N.C. Gen. Stat. § 14-27.5A(a)(2) is not a lesser included offense of second-degree rape under N.C. Gen. Stat. § 14-27.3(a)(2) and we disagree with defendant.

II.

[2] Defendant contends the trial court erred in denying his requested instruction on the offense of assault on a female because assault on a female is a lesser included offense of statutory rape. We disagree.

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As explained above, “[i]f the lesser crime has an essential element which is not completely covered by the greater crime, it is not a lesser included offense.” *Weaver*, 306 N.C. at 635, 295 S.E.2d at 379. The crime of assault on a female under N.C. Gen. Stat. § 14-33(c)(2) (2005) has essential elements that are not covered by the crime of statutory rape under N.C. Gen. Stat. § 14-27.7A(a) (2005). First, the crime of assault on a female requires proof of an assault, N.C. Gen. Stat. § 14-33(c)(2), whereas statutory rape does not require proof of an assault. N.C. Gen. Stat. § 14-27.7A(a). Second, the crime of assault on a female requires proof that the defendant is a male, N.C. Gen. Stat. § 14-33(c)(2), which the crime of statutory rape does not require. N.C. Gen. Stat. § 14-27.7A(a). Accordingly, we disagree with defendant.

III.

[3] Defendant contends the trial court erred by admitting the testimony of an SBI agent regarding the DNA examination and report of a non-testifying SBI agent in violation of defendant’s constitutional right to confrontation and the rules of evidence. We disagree.

With regard to the DNA report, defense counsel was afforded the opportunity to formally object to the jury receiving the report during deliberations. The trial court asked defendant’s counsel whether he wished to be heard on the matter. Not only did defense counsel fail to object to the jury receiving this document, he consented. The following exchange occurred:

[DEFENSE COUNSEL]: I don’t know if they just want the specific DNA report o[r] if they want the other laboratory report. I would continue [sic] to the Court to send them both back.

THE COURT: Do ya’ll have any objections to sending all the exhibits back?

[PROSECUTOR]: No, Sir.

....

[DEFENSE COUNSEL]: I don’t have any objection. If [the prosecutor] and I could just go through those documents, just very quickly make sure that we think everything is in there that is a document.

Defense counsel failed to object and his argument has not been preserved on appeal. N.C. R. App. P. 10(b)(1) (2007). Further, defense

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counsel did not assign error in his appellate brief to the jury receiving the DNA report during deliberations. N.C. R. App. P. 10(a). This assignment of error is dismissed.

[4] At trial, SBI Agent David Freeman testified about a DNA analysis that was performed by Agent Jenny Elwell on a cutting taken from the gray pants recovered from Ms. Gladden's house. Agent Elwell did not testify at trial because she was in Seattle, Washington, attending a conference. Agent Freeman's opinion was based on Agent Elwell's report and notes. Defendant objected at trial to Agent Freeman's testimony citing *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004). Defendant stated that the testimony violated his Sixth Amendment Confrontation Clause rights, as well as N.C. Gen. Stat. § 8C-1, Rules 702 and 703. The trial court overruled defendant's objection. On appeal, defendant contends that Agent Freeman's testimony violated his Confrontation Clause rights and was inadmissible hearsay.

We determine defendant's Confrontation Clause rights were not violated. "[I]t is well established [that there is no violation of a defendant's right of confrontation under the rationale of *Crawford* when] an expert . . . base[s] an opinion on tests performed by others in the field and [d]efendant was given an opportunity to cross-examine [the testifying expert] on the basis of his opinion[.]" *State v. Delaney*, 171 N.C. App. 141, 144, 613 S.E.2d 699, 701 (2005). Although the State did not formally tender Agent Freeman as an expert witness, he can still testify as an expert. *See State v. White*, 340 N.C. 264, 293-94, 457 S.E.2d 841, 858 ("While the better practice may be to make a formal tender of a witness as an expert, such a tender is not required."), *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 436 (1995). Accordingly, we disagree with defendant.

IV.

[5] Defendant contends the trial court erred in overruling his objection to his statement about his age made during a custodial interrogation without the benefit of *Miranda* warnings, in violation of his constitutional right to be free from self-incrimination. We disagree.

At the time of defendant's arrest, Officer K.L. Putnam of the Kings Mountain Police Department asked defendant questions, including what defendant's date of birth was, as part of the booking process. Defendant objected at trial to allowing Officer Putnam to testify what defendant said his date of birth was, arguing that the statement was

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obtained in violation of his *Miranda* rights and should therefore be suppressed. The trial court overruled this objection and denied the motion to suppress. On appeal, defendant challenges this ruling.

After reviewing the record and transcript, we determine that any error by the trial court was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b) (2005). Defendant's mother testified at trial that she gave birth to defendant on 1 February 1969. Therefore, even if Officer Putnam's testimony was completely disregarded, there was other evidence of defendant's date of birth. Accordingly, we disagree with defendant.

V.

[6] Defendant contends the trial court's jury instructions failed to ensure that the jury's verdicts were unanimous. We disagree.

In determining whether a defendant has been unanimously convicted by a jury, our courts have looked at many factors including: (1) whether defendant raised an objection at trial regarding unanimity; (2) whether the jury was instructed on all issues, including unanimity; (3) whether separate verdict sheets were submitted to the jury for each charge; (4) the length of time the jury deliberated and reached a decision on all counts submitted to it; (5) whether the record reflected any confusion or questions as to jurors' duty in the trial; and (6) whether, if polled, each juror individually affirmed that he or she had found defendant guilty in each individual case file number. *See State v. Lawrence*, 360 N.C. 368, 376, 627 S.E.2d 609, 613 (2006).

Here, we determine there was no problem with the unanimity of the jury's verdicts. The jury was instructed on all the issues, including unanimity. The trial court states that the jury's verdicts must be unanimous by stating, "You may not return a verdict until all 12 jurors agree unanimously." Separate verdict sheets were submitted for each charge. In addition, two verdict sheets were used for the two statutory rape charges and were differentiated by the date of the alleged offense. Further, the record does not reflect that the jury was confused. Accordingly, we disagree with defendant.

No prejudicial error.

Chief Judge MARTIN and Judge TYSON concur.

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[186 N.C. App. 124 (2007)]

STATE OF NORTH CAROLINA v. WILLIAM ROGER McLAMB

No. COA06-1319

(Filed 18 September 2007)

Search and Seizure— probable cause for vehicle stop—officer’s mistaken belief about speed limit

An officer’s stop of a motor vehicle based on a mistaken belief that a speeding violation occurred is not objectively reasonable and cannot support probable cause to stop the vehicle. The trial judge in this case correctly granted defendant’s motion to suppress evidence of driving while impaired where the sole reason for the stop was the officer’s mistaken belief about the speed limit in that area.

Appeal by State of North Carolina from order entered 10 May 2006 by Judge William C. Griffin, Jr., in Hyde County Superior Court. Heard in the Court of Appeals 21 May 2007.

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

Tharrington Smith, L.L.P., by Michael Crowell and Denise Walker, for defendant-appellee.

STEELMAN, Judge.

An officer’s stop of a motor vehicle based upon a mistaken belief that a speeding violation occurred is not objectively reasonable and cannot support probable cause to stop the vehicle. The trial court correctly concluded that the fruits of such a stop must be suppressed.

While patrolling Ocracoke Island on 16 May 2005, Deputy Matthew Shane Bryan (“Deputy Bryan”) observed William Roger McLamb (“defendant”) driving a sports utility vehicle around a ninety degree curve at approximately thirty miles per hour. Deputy Bryan believed the speed limit on the road was twenty miles per hour. The road was outside of any municipal limits, and neither the Hyde County Commissioners nor the North Carolina Department of Transportation had taken action to reduce the speed limit from fifty-five miles per hour to twenty miles per hour. There was no ordinance of record setting the speed limit at twenty miles per hour. There is no dispute that the speed limit on the road in question was actually fifty-five miles per hour.

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Deputy Bryan stopped defendant and determined that defendant had been driving after having consumed alcohol. He gave defendant a warning ticket for the speeding violation and charged him with driving while impaired in violation of N.C. Gen. Stat. § 20-138.1.

On 1 March 2006, defendant filed a motion to dismiss and a motion to suppress in the Superior Court of Hyde County on the basis that Deputy Bryan did not have “any lawful reasonable suspicion” to stop defendant’s vehicle. The motions stated that: (1) Deputy Bryan’s sole reason for stopping defendant was for a speeding violation; (2) the speed limit was actually fifty-five miles per hour; and (3) defendant was driving within that speed limit.

Following a hearing on 10 May 2006, the court entered an order allowing defendant’s motion to suppress. From this ruling, and pursuant to N.C. Gen. Stat. § 15A-979(c) and 15A-1445(b), the State appeals.

In its sole argument, the State contends that the trial court erred in granting defendant’s motion to suppress. We disagree.

Generally, “the scope of appellate review of an order [suppressing evidence] is strictly limited to determining whether the trial judge’s underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge’s ultimate conclusions of law.” *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted). “Where, however, the trial court’s findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal.” *State v. Roberson*, 163 N.C. App. 129, 132, 592 S.E.2d 733, 735-36, *cert. denied*, 358 N.C. 240, 594 S.E.2d 199 (2004). In the instant case, the State does not challenge any of the trial court’s findings of fact. “[A] trial court’s conclusions of law regarding whether the officer had reasonable suspicion [or probable cause] to detain a defendant is reviewable *de novo*.” *State v. Wilson*, 155 N.C. App. 89, 93-94, 574 S.E.2d 93, 97 (2002) (internal quotation marks and citations omitted). “The trial court’s conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found.” *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (internal quotation marks and citations omitted).

The Fourth Amendment of the United States Constitution and Article I, section 20, of the North Carolina Constitution require the

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exclusion of evidence obtained by unreasonable searches and seizures. *See State v. Ivey*, 360 N.C. 562, 633 S.E.2d 459, *reh'g denied*, 360 N.C. 655, 636 S.E.2d 573 (2006). “[T]he decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.” *Whren v. United States*, 517 U.S. 806, 810, 135 L. Ed. 2d 89, 95 (1996). An officer must have probable cause to stop a vehicle for a readily observable violation such as speeding. *State v. Wilson*, 155 N.C. App. 89, 94, 574 S.E.2d 93, 97 (2002).

The question presented for our review is whether a mistaken belief by a law enforcement officer that a defendant has violated the speed limit can constitutionally support a stop of the vehicle.

In a similar case involving an officer’s mistaken belief that defendant had violated a turn signal law, our Supreme Court held that the justification for a traffic stop must be objectively reasonable. *Ivey*, 360 N.C. 562, 633 S.E.2d 459. In *Ivey*, the defendant was stopped for failing to give a turn signal and thereafter charged with unlawful possession of a firearm. Defendant challenged the legality of the initial stop.

As a predicate to its analysis, the Court stated:

In examining the legality of a traffic stop, the proper inquiry is not the subjective reasoning of the officer, but whether the objective facts support a finding that probable cause existed to stop the defendant. Probable cause exists when there is a fair probability or substantial chance a crime has been committed and that the defendant committed it. Thus, the United States and North Carolina Constitutions require an officer who makes a seizure on the basis of a perceived traffic violation to have probable cause to believe the driver’s actions violated a motor vehicle law.

Id. at 564, 633 S.E.2d at 460-61 (citations omitted); *see also United States v. McDonald*, 453 F.3d 958, 962 (7th Cir. 2006) (holding that “[a] stop based on a subjective belief that the law has been broken, when no violation actually occurred, is not objectively reasonable.”) The Court then examined whether the defendant’s failure to signal actually violated the law. Holding that it did not violate traffic laws, the Court concluded that there was no probable cause to stop defendant, that the stop violated defendant’s rights under the Fourth Amendment to the United States Constitution, and that the fruits of

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the illegal stop must be suppressed. *Ivey*, 360 N.C. at 566, 633 S.E.2d at 462.

United States Courts of Appeals have made similar holdings, which we find persuasive. Most recently, the Seventh Circuit Court of Appeals voiced its agreement “with the majority of circuits . . . that a police officer’s mistake of law cannot support probable cause to conduct a [traffic] stop.” *McDonald*, 453 F.3d at 961; accord *United States v. DeGasso*, 369 F.3d 1139, 1144-45 (10th Cir. 2004) (finding that an officer’s failure to understand the law “is not objectively reasonable” and thus cannot form the justifiable basis for a traffic stop); *United States v. Chanthasouxat*, 342 F.3d 1271, 1279-80 (11th Cir. 2003) (holding that a mistake of law cannot provide reasonable suspicion or probable cause to justify a traffic stop, and noting the fundamental unfairness of applying different standards regarding ignorance of the law to citizens than to police); *United States v. Twilley*, 222 F.3d 1092 (9th Cir. 2000) (finding that traffic stops based upon a mistake of law violate the Fourth Amendment); *United States v. Lopez-Valdez*, 178 F.3d 282 (5th Cir. 1999) (refusing to apply the good faith exception where an officer stopped the defendant for a broken tail light ten years after Texas courts had ruled that such stops were unjustified).

In *Lopez-Valdez*, the Fifth Circuit stated: “[I]f officers are allowed to stop vehicles based upon their subjective belief that traffic laws have been violated even where no such violation has, in fact, occurred, the potential for abuse of traffic infractions as pretext for effecting stops seems boundless and the costs to privacy rights excessive.” 178 F.3d at 289.

Based upon *Whren*, *Ivey*, and the reasoning of the many cases cited from the Federal Courts of Appeals, we conclude that the legal justification for Deputy Bryan’s stop of defendant’s vehicle was not objectively reasonable. Whether the legal justification for Deputy Bryan’s traffic stop was subjectively reasonable is irrelevant.

Deputy Bryan’s sole reason for stopping defendant was for an alleged speeding violation. The State conceded in oral argument that the speed limit on the road was actually fifty-five miles per hour, and the defendant was driving within the speed limit. Because the legal justification for this traffic stop was not objectively reasonable, we hold that the stop violated defendant’s Fourth Amendment rights. To hold otherwise would be to “allow[] [officers] to stop vehicles based upon their subjective belief that traffic laws have been violated even

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where no such violation has, in fact, occurred[.]” *Lopez-Valdez*, 178 F.3d at 289.

We affirm the trial court’s order granting defendant’s motion to suppress.

AFFIRMED.

Chief Judge MARTIN and Judge STEPHENS concur.

STATE OF NORTH CAROLINA v. KENNETH EARL PRITCHARD

No. COA06-1559

(Filed 18 September 2007)

**Sentencing— prior record level on resentencing—conviction
after sentencing**

When recalculating a defendant’s prior record level at resentencing, the court may consider a conviction that was entered after the original sentencing but before the resentencing.

Appeal by Defendant from judgments entered 8 June 2006 by Judge William C. Griffin in Superior Court, Beaufort County. Heard in the Court of Appeals 22 August 2007.

Attorney General Roy Cooper, by Associate Attorney General LaToya B. Powell, for the State.

Geoffrey W. Hosford for Defendant.

McGEE, Judge.

Kenneth Earl Pritchard (Defendant) entered a plea of guilty to second-degree murder and assault with a deadly weapon with intent to kill. Superior Court Judge Jack W. Jenkins entered judgment on 27 October 2003 and sentenced Defendant to a term of 196 months to 245 months in prison for second-degree murder and to a consecutive term of 31 months to 47 months in prison for the assault charge. Defendant appealed, and in *State v. Pritchard*, 172 N.C. App. 174, 616 S.E.2d 28 (2005) (unpublished), our Court

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found error in the determination of aggravating factors and remanded the case for re-sentencing.

Defendant was re-sentenced on 8 June 2006 by Superior Court Judge William C. Griffin to a term of 189 months to 236 months in prison for second-degree murder and to a consecutive term of 29 months to 44 months in prison for the assault charge. Between Defendant's sentencing on 27 October 2003 and his re-sentencing on 8 June 2006, Defendant was convicted of another offense on 28 March 2005. As a result of the 28 March 2005 conviction, the trial court determined that Defendant had a prior record level of II at re-sentencing, rather than a record level of I, as he had at the time of his original sentencing on 27 October 2003.

Defendant argues the trial court erred by including his 28 March 2005 conviction in the determination of his prior record level because that conviction did not exist at the time Defendant was originally sentenced. N.C. Gen. Stat. § 15A-1340.14(a) (2005) provides:

The prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions that the court, or with respect to subdivision (b)(7) of this section, the jury, finds to have been proved in accordance with this section.

N.C. Gen. Stat. § 15A-1340.11(7) (2005) states: "Prior conviction.—A person has a prior conviction when, on the date a criminal judgment is entered, the person being sentenced has been previously convicted of a crime[.]"

Our Court previously decided the precise issue presented in the present case in *State v. Borders*, 171 N.C. App. 363, 615 S.E.2d 96 (2005) (unpublished). Although we are not bound by a prior unpublished decision, see *United Services Automobile Assn. v. Simpson*, 126 N.C. App. 393, 396, 485 S.E.2d 337, 339, *disc. review denied*, 347 N.C. 141, 492 S.E.2d 37 (1997) (holding that this Court is not bound by a prior unpublished decision of another panel of this Court), we find the reasoning of *Borders* instructive. In *Borders*, we held that "[a]ccording to [N.C.G.S. § 15A-1340.11(7)], a person has a prior conviction if he has the conviction as of the time he is being sentenced." Therefore, our Court held that because the defendant in *Borders* had the conviction at the time he was re-sentenced, the trial court properly considered the conviction in determining the defendant's prior record level.

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In support of the holding in *Borders*, our Court also relied upon *State v. Mixion*, 118 N.C. App. 559, 455 S.E.2d 904 (1995), which interpreted similar provisions of the Fair Sentencing Act. In *Mixion*, the defendant was convicted and sentenced on 5 April 1991. *Id.* at 561, 455 S.E.2d at 905. The defendant appealed and our Court affirmed the conviction, but remanded the case for re-sentencing. *Id.* Between the time of the defendant's original sentencing and his re-sentencing hearing, the defendant was convicted of another offense. *Id.* at 562, 455 S.E.2d at 905. Based upon this offense, the trial court, at the defendant's re-sentencing hearing, found the aggravating factor of a prior conviction. *Id.* Our Court held that "at the time of resentencing, [the] defendant had a prior conviction[]" and, therefore, the trial court properly found this prior conviction as an aggravating factor. *Id.* at 563-64, 455 S.E.2d at 906. In a parenthetical, our Court noted:

Our holding is buttressed by the newly enacted [N.C. Gen. Stat.] § 15A-1340.11(7) (Cum. Supp. 1994), applicable to offenses occurring on or after 1 October 1994, which states "[a] person has a prior conviction when, on the date a criminal judgment is entered, the person being sentenced has been previously convicted of a crime[.]"

Id. at 563, 455 S.E.2d at 906.

In support of his argument, Defendant relies upon N.C. Gen. Stat. § 15A-1331(b), which provides: "For the purpose of imposing sentence, a person has been convicted when he has been adjudged guilty or has entered a plea of guilty or no contest." N.C. Gen. Stat. § 15A-1331(b) (2005). However, this statute speaks only to the issue of when a person is deemed to have a conviction. Our Court has "interpreted N.C. Gen. Stat. § 15A-1331(b) to mean that formal entry of judgment is not required in order to have a conviction." *State v. Canellas*, 164 N.C. App. 775, 778, 596 S.E.2d 889, 891 (2004) (quoting *State v. Hatcher*, 136 N.C. App. 524, 527, 524 S.E.2d 815, 817 (2000)). In other words, a person has a conviction immediately upon being found guilty by a jury, see *State v. Fuller*, 48 N.C. App. 418, 420, 268 S.E.2d 879, 881, *disc. review denied*, 301 N.C. 403, 273 S.E.2d 448 (1980), or upon pleading guilty or no contest. See *Hatcher*, 136 N.C. App. at 527, 524 S.E.2d at 817. In contrast, N.C.G.S. § 15A-1340.11(7) specifies the point at which a conviction qualifies as a "prior conviction." Under N.C.G.S. § 15A-1340.11(7), a person has a prior conviction if the person has that conviction, as determined by N.C.G.S.

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§ 15A-1331(b), on the date a judgment is entered. In the present case, judgment was entered against Defendant at his re-sentencing on 8 June 2006. At that point in time, Defendant had previously been convicted of another offense on 28 March 2005.

For the reasons stated above, we hold that for purposes of calculating a defendant's prior record level at re-sentencing, a trial court may consider a defendant's conviction that was entered after the defendant's original sentencing, but prior to the defendant's re-sentencing. Therefore, the trial court did not err by considering Defendant's 28 March 2005 conviction in its determination of Defendant's prior record level at re-sentencing. We overrule this assignment of error. Defendant failed to set forth argument pertaining to his remaining assignment of error and we deem it abandoned. *See* N.C.R. App. P. 28(b)(6).

Affirmed.

Judges STEPHENS and SMITH concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 18 SEPTEMBER 2007

CALHOUN v. GOLIAN No. 06-1525	Wake (98CVD13218)	Affirmed
DAVIS v. SGT. PEPPERS REST. & BAR, INC. No. 06-1469	Catawba (04CVS1183)	Affirmed
HALL v. COHEN No. 06-1531	Pitt (02CVS1382)	Affirmed
IN RE A.B.W. & A.F.W. No. 07-448	Catawba (05JA88-89)	Affirmed
IN RE M.J.W., S.F.W., E.E.W. No. 07-639	Orange (06JA165-67)	Reversed and remanded
IN RE S.A.J. No. 07-452	Gaston (06JA56)	Affirmed
IN RE T.L.M., T.J.M., J.K.J. No. 07-660	Haywood (06J51-53)	Affirmed
NEBLETT v. HANOVER INSPECTION SERV., INC. No. 06-1676	New Hanover (06CVS2113)	Affirmed
PICKETT v. ROBERSON No. 06-1313	Guilford (05CVS4535)	Affirmed
STATE v. BREWTON No. 06-1511	Buncombe (03CRS56368)	No error
STATE v. BURRELL No. 06-1609	Guilford (95CRS69712-13)	No error
STATE v. CAMPBELL No. 06-1043	Davidson (04CRS58035)	New trial
STATE v. DESKINS No. 06-622	Wilkes (02CRS55283)	Affirmed
STATE v. GRAVES No. 06-1442	Alamance (05CRS54818)	No error
STATE v. HARDY No. 06-1518	Edgecombe (05CRS53063)	No error

STATE v. JONES No. 06-1332	Buncombe (05CRS9577) (05CRS55842)	No error
STATE v. WEST No. 06-1487	New Hanover (03CRS21888-89) (03CRS21891-92)	Affirmed
WRIGHT v. KUMMERER No. 06-1187	Wake (03CVS7912)	No error

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DAVID STANDLEY, PLAINTIFF v. TOWN OF WOODFIN, AN INCORPORATED MUNICIPALITY IN THE STATE OF NC; AND BRETT HOLLOMAN, CHIEF OF POLICE, IN HIS OFFICIAL CAPACITY, DEFENDANTS

No. COA06-1449

(Filed 2 October 2007)

Constitutional Law; Sexual Offenses— registered sex offender—access to public park prohibited

The trial court did not err by granting summary judgment for the defendant town on a challenge to an ordinance which declared that entry into the public parks of the town by registered sex offenders was an offense against the regulations of the town. The ordinance is restrictive only as to defendant's public parks and does not violate the right to intrastate travel; it is not punitive in intent nor effect and does not violate the ex post facto clause; and it is rationally related to its intended purpose of protecting the health and safety of the citizens of the town.

Judge GEER dissenting.

Appeal by Plaintiff from judgment entered 7 August 2006 by Judge James L. Baker in Buncombe County Superior Court. Heard in the Court of Appeals 23 May 2007.

Cloninger, Elmore, Hensley & Searson, PLLC, by Bruce A. Elmore, Jr., for plaintiff.

Ferikes & Bleyнат, by Joseph A. Ferikes, for defendant.

ELMORE, Judge.

David Standley (plaintiff) appeals a judgment of the Buncombe County Superior Court entered 7 August 2006. For the reasons stated herein, we affirm the decision.

Plaintiff resides with his mother in the Town of Woodfin (Woodfin) in Buncombe County. In 1987, while living in Florida, plaintiff was convicted of attempted sexual battery and aggravated assault against a woman, making him subject to the North Carolina Sex Offender & Public Protection Registry (the Registry). The Registry requires individuals who have committed an offense against a minor or a sexually violent offense to register as sex offenders. N.C. Gen. Stat. §§ 14-208.6(4), 14-208.7(a) (2005). Plaintiff served three and a

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half years of his nine-and-a-half-year sentence; the remaining six years of his sentence were suspended and he was placed on supervised probation. In 1995, plaintiff was convicted of solicitation of prostitution. As a result, his probation was revoked. In 1999, plaintiff was unconditionally released. In 2004, he moved to Buncombe County, where he registered with the Registry at the sheriff's office as required by N.C. Gen. Stat. § 14-208.7.

Plaintiff suffered a stroke in 1998, as a result of which he never travels without his mother. Plaintiff frequented the Woodfin Riverside Park, always with his mother and sometimes with other family members as well.

Plaintiff challenged an ordinance, enacted on 19 April 2005, that prohibits registered sex offenders from knowingly entering any public park owned and operated by defendant-appellee Woodfin (the ordinance). The ordinance states, in relevant part,

It shall constitute a general offense against the regulations of the Town of Woodfin for any person or persons registered as a sex offender with the state of North Carolina and or any other state or federal agency to knowingly enter into or on any public park owned, operated, or maintained by the Town of Woodfin.

Woodfin, N.C., Ordinances § 130.03 (19 April 2005). Prior to the enactment of the ordinance, two incidents of sexual offenses occurred in or near two of the three public parks in Woodfin. Plaintiff and Woodfin¹ filed motions for judgment on the pleadings and summary judgment. The Buncombe County Superior Court granted Woodfin's motion for summary judgment. Plaintiff appeals.

We review the trial court's decision *de novo*. *Magnolia Mfg. of N.C. v. Erie Ins. Exch. Ins.*, 179 N.C. App. 267, 277, 633 S.E.2d 841, 847 (2006) (citing *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004)). "Alleged errors of law are subject to *de novo* review on appeal." *Falk Integrated Tech., Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 574 (1999) (citation omitted). Rulings on motions for judgment on the pleadings under N.C. Gen. Stat. § 1A-1, Rule 12(c) are also reviewed *de novo*. *Toomer v. Branch Banking & Tr. Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335 (2005) (citations omitted).

1. Brett Hollomon, Chief of Police, is also a party to this case in his official capacity. Hereinafter, references to defendant-appellee Woodfin implicitly include Hollomon.

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Plaintiff first argues that the ordinance violates his fundamental right to travel through “public spaces,” protected by the due process clause of the Fourteenth Amendment. He also argues that the ordinance denies him his constitutional freedom to intrastate travel as recognized in *Williams v. Fears*, 179 U.S. 270, 274, 45 L. Ed. 186, 188 (1900) (finding that “the right, ordinarily, of free transit from or through the territory of any state is a right secured by the 14th Amendment”).

Substantive due process is not a blanket protection. In *Doe v. City of Lafayette, Ind.*, the United States Court of Appeals for the Seventh Circuit found that the right to enter public parks for “innocent, recreational purposes” is not a fundamental right. 377 F.3d 757, 771 (7th Cir. 2004).

In *Willis v. Town of Marshall, N.C.*, the United States Court of Appeals for the Fourth Circuit noted the division on the issue of whether intrastate travel is a fundamental right, but did not reach a conclusion. 426 F.3d 251, 265 (4th Cir. 2005) (comparing *Lutz v. City of York*, 899 F.2d 255, 259-68 (3d Cir. 1990) in which intrastate travel is a recognized fundamental right, with *Doe*, 377 F.3d at 770-71, which rejects sex offenders’ claim to a fundamental right to access public parks). However, the *Willis* court points to the general rule that courts “must be reluctant to expand the concept of substantive due process because guideposts . . . in this uncharted area are scarce and open-ended,” and courts run the risk of turning the due process clause into a personal preference policy instrument for judges. *Willis*, 426 F.3d at 266-67 (quotations and citations omitted).

The right to intrastate travel is a “right of function.” *Johnson v. City of Cincinnati*, 310 F.3d 484, 498 (6th Cir. 2002). We therefore hold that the right to enter parks is not encompassed by either the fundamental right of travel or the right to intrastate travel. The ordinance does not infringe upon plaintiff’s fundamental right to intrastate travel because it does not impair his daily functions. The ordinance does not prevent plaintiff from enjoying the open air with his mother and his friends in other locations if he so desires: it is restrictive only as to defendant’s public parks.

Plaintiff further argues that the ordinance is not rationally related to a legitimate government interest and thus violates his substantive due process rights. He claims that although the intent of the ordinance is to protect *children* who use Woodfin’s park system, the ordinance prohibits *all* registered sex offenders from entering

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those parks. The town minutes from a meeting to consider the ordinance recognize child safety as one of the concerns, but do not definitively point to the safety of children as the main purpose of the ordinance. Plaintiff argues that he has never committed a crime against a child, nor has he been accused of engaging in any kind of indecent behavior directed at a child or anyone else while visiting any park in Woodfin.

“[N]arrow tailoring is required only when fundamental rights are involved. The impairment of a lesser interest . . . demands no more than a ‘reasonable fit’ between governmental purpose . . . and the means chosen to advance that purpose.” *Reno v. Flores*, 507 U.S. 292, 305, 123 L. Ed. 2d 1, 18 (1993). Substantive due process serves to protect individuals from arbitrary government actions that lack “reasonable justification in the service of a legitimate government objective.” *Dobrowolska v. Wall*, 138 N.C. App. 1, 14, 530 S.E.2d 590, 599 (2000) (quotations and citation omitted).

In *State v. Stewart*, this Court found overbroad a North Carolina law prohibiting motorists from shining light into the area past a roadway during certain hours, effectively prohibiting cars from having their headlights on during those times. 40 N.C. App. 693, 696-97, 253 S.E.2d 638, 640-41 (1979). The law constituted an “arbitrary interference with otherwise innocent conduct and lack[ed] any rational . . . relation to the . . . general welfare.” *Id.* at 697, 253 S.E.2d at 641. Having found the law overbroad, this Court did not consider whether or not intrastate travel was a fundamental right. *Id.* at 698, 253 S.E.2d at 641.

Plaintiff’s assertion that the intended purpose of the ordinance is the protection of children is tenuous. The text of the resolution adopting the ordinance suggests a broader reach:

Whereas the Town of Woodfin maintains a park system that is meant for the peaceful enjoyment of children and *other citizens*, and;

Whereas it is in the interest of promoting the general welfare and safety of the people of Woodfin

Thus, plaintiff’s claim that the ordinance was intended only to protect children is unpersuasive. Even if we were to find that the right to access public parks is a fundamental right, which we expressly decline to do, the ordinance is rationally related to the legitimate government interest it aims to address.

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The United States Supreme Court has specifically recognized the inherent danger of reintegrating sex offenders into society. In *Conn. Dep't of Pub. Safety v. Doe*, the Court stated that “[s]ex offenders are a serious threat in this Nation. The victims of sex assault are most often juveniles, and when convicted sex offenders reenter society, they are much more likely than any other type of offender to be re-arrested for a new rape or sex assault.” 538 U.S. 1, 4, 155 L. Ed. 2d 98, 103 (2003) (quotations and citations omitted).

By restricting only registered sex offenders from entering public parks, which are frequented by children and other citizens, the ordinance promotes the general welfare and safety of Woodfin’s citizens, which is a legitimate government purpose. Thus, we find the ordinance to be rationally related to a legitimate government purpose.

Plaintiff next argues that the ordinance is punitive in a way that would violate the *ex post facto* clause, and relies on the five-part test adopted in *Smith v. Doe*: (1) whether it “promotes the traditional aims of punishment”; (2) whether the law was “regarded in history and tradition as punishment”; (3) whether it “imposes an affirmative disability or restraint”; (4) whether it “has a rational connection to a nonpunitive purpose”; or (5) whether it “is excessive with respect to [that] purpose.” *Smith v. Doe*, 538 U.S. 84, 97, 155 L. Ed. 2d 164, 180 (2003) (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 9 L. Ed. 2d 644, 661 (1963) (considering two additional factors not considered in *Smith*)).

The *Mendoza-Martinez* factors should only be used in the absence of conclusive evidence of legislative intent. *Mendoza-Martinez*, 372 U.S. at 169. 9 L. Ed. 2d at 661. “[W]e will reject the legislature’s manifest intent only where a party challenging the statute provides the clearest proof that the statutory scheme is so punitive either in purpose or effect as to negate the State’s intention.” *Kansas v. Hendricks*, 521 U.S. 346, 361, 138 L. Ed. 2d 501, 515 (1997) (internal quotations, citations, and alterations omitted). As previously noted, the town meeting minutes reveal a non-punitive intention to maintain the parks for the enjoyment and safety of the people of Woodfin.

Plaintiff argues that despite its lack of punitive intent, the ordinance is punitive in effect. Plaintiff focuses mainly on the assertion that the ordinance promotes deterrence and retribution. He also argues that the ordinance has the effect of banishing him from public spaces, which he argues has been traditionally regarded as punishment throughout history. However, the case upon which he relies

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for this assertion refers to banishment in terms of “forfeiture of citizenship,” which is not at issue here. *See Mendoza-Martinez*, 372 U.S. at 168 n.23, 9 L. Ed. 2d at 661.

Plaintiff also reiterates that the ordinance is not narrowly tailored to serve its nonpunitive purpose. He reasons that it could create a false sense of security because children may be molested by someone that they know. However, in *Smith*, the Supreme Court found that “[a] statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance.” *Smith*, 538 U.S. at 103, 155 L. Ed. 2d at 183 (finding that a statute requiring registration of sex offenders was nonpunitive, serving the purpose of public safety).

Restrictions on a person’s activities may be imposed without being punitive. The ordinance does not subject registered sex offenders to affirmative disability or restraint; they may still travel freely and attend to their daily functions. Thus, plaintiff’s arguments that the ordinance is punitive in effect are not convincing. The ordinance, being neither punitive in intent nor effect, does not violate the *ex post facto* clause.

“The police power of the State is broad enough to sustain the promulgation and fair enforcement of laws designed to restore the right of safe travel by temporarily restricting all travel, other than necessary movement reasonably excepted from the prohibition.” *State v. Dobbins*, 277 N.C. 484, 499, 178 S.E.2d 449, 458 (1971). This police power “extends to all the compelling needs of the public health, safety, morals and general welfare.” *Id.* at 497, 178 S.E.2d at 457. Though a city does not have inherent police power, this power is delegated by statute to cities in North Carolina: “A city may by ordinance define, prohibit, regulate, or abate acts . . . detrimental to the health, safety, or welfare of its citizens” N.C. Gen. Stat. § 160A-174 (2005). This Court has held that municipalities may regulate within their boundaries for the purpose of protecting public property. *Slavin v. Town of Oak Island*, 160 N.C. App. 57, 60, 584 S.E.2d 100, 102 (2003); *see also Euclid v. Amber Realty*, 272 U.S. 364, 395, 71 L. Ed. 303, 314 (1926) (“[B]efore the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”) (citations omitted).

The North Carolina Supreme Court held in *Dobbins* that although individuals have “the right to travel upon the public streets of a city”

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as protected by the due process clause, this freedom may be regulated “when reasonably deemed necessary to the public safety, by laws reasonably adapted to the attainment of that objective.” *Dobbins*, 277 N.C. at 497, 178 S.E.2d 456. The Court balances the police power of the State with the right to travel

by the process of locating many separate points on either side of the line. So long as this Court sits, it will be engaged in that process, but it is not necessary or appropriate in the present instance to attempt to draw sharply, throughout its entire length, the line between the right of the individual to travel and the authority of the State to limit travel.

Id. at 497-98, 178 S.E.2d 457. Here, as in *Dobbins*, the ordinance falls on the side of a reasonable restriction.

We also note that “[a] facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully.” *United States v. Salerno*, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 707 (1987). “The presumption is that any act passed by the legislature is constitutional, and the court will not strike it down if [it] can be upheld on any reasonable ground.” *Ramsey v. Veterans Commission*, 261 N.C. 645, 647, 135 S.E.2d 659, 661 (1964). Similarly, “[a] municipal ordinance is presumed to be valid . . .” *Currituck County v. Willey*, 46 N.C. App. 835, 836, 266 S.E.2d 52, 53 (quotations and citation omitted).

“[T]he burden is upon the complaining party to show its invalidity or inapplicability. And a municipal ordinance promulgated in the exercise of the police power will not be declared unconstitutional unless it is clearly so, and every intendment will be made to sustain it.” *Id.* Plaintiff is required to show that “ ‘the ordinance does not rest upon any reasonable basis, but is essentially arbitrary;’ and ‘[i]f any state of facts reasonably can be conceived that would sustain the ordinance, the existence of that state of facts at the time the ordinance was enacted must be assumed.’ ” *Id.* (quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79, 55 L. Ed. 369, 377 (1910)) (alterations omitted). Here, plaintiff has not met his burden of proof.

Because we find the ordinance to be rationally related to its intended purpose of protecting the health and safety of the citizens of Woodfin, we hold that defendant acted within its delegated police power to enact and enforce an ordinance restricting sex offenders from entering Woodfin’s public parks for the purpose of promoting citizen safety.

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The order of the trial court is therefore affirmed.

Affirmed.

Judge TYSON concurs.

Judge GEER dissents by separate opinion.

GEER, Judge, dissenting.

Because I cannot conclude that the trial court properly entered summary judgment upholding the Town of Woodfin's ordinance, I must respectfully dissent. N.C. Gen. Stat. § 160A-174(b) (2005) provides:

A city ordinance shall be consistent with the Constitution and laws of North Carolina and of the United States. An ordinance is not consistent with State or federal law when:

- (1) The ordinance infringes a liberty guaranteed to the people by the State or federal Constitution;

. . . .

- (5) The ordinance purports to regulate a field for which a State or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation

I would hold that the Woodfin ordinance violates both N.C. Gen. Stat. § 160A-174(b)(1) and (b)(5).

**Courts' Obligation to Decline to Rule Unnecessarily
Upon Constitutional Questions**

As an initial matter, I recognize that plaintiff has stipulated that "[b]ut for the question concerning its constitutionality, . . . the ordinance is valid and enforceable." It is, however, a well established principle of jurisprudence that "appellate courts must 'avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds.'" *James v. Bartlett*, 359 N.C. 260, 266, 607 S.E.2d 638, 642 (2005) (quoting *Anderson v. Assimios*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002)). *See also Brooks v. Taylor Tobacco Enterprises, Inc.*, 298 N.C. 759, 761, 260 S.E.2d 419, 421 (1979) ("It is an established principle of appellate review that this court will refrain from deciding constitutional questions when there is an alternative

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ground available upon which the case may properly be decided.”); *Carillon Assisted Living, LLC v. N.C. Dep’t of Health and Human Servs.*, 175 N.C. App. 265, 271, 623 S.E.2d 629, 634 (declining to address dissent’s constitutional argument because case could be resolved on purely statutory grounds), *disc. review denied*, 360 N.C. 531, 633 S.E.2d 676 (2006), *and appeal dismissed*, 361 N.C. 218, 641 S.E.2d 802 (2007).

This rule applies even when the parties’ appeal makes only a constitutional argument. Thus, in *State v. Lueders*, 214 N.C. 558, 560, 200 S.E. 22, 23 (1938), the defendant had—not unlike Mr. Standley here—stipulated at the trial level to the facts because “[t]he purpose of [the] appeal, frankly avowed, [was] to obtain a reconsideration of [a prior Supreme Court decision] and to test again the constitutionality of [a statute].” Nonetheless, our Supreme Court declined to do so since “if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of lesser moment, the latter alone will be determined [as] [i]t is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.” *Id.* at 561, 200 S.E. at 23 (internal quotation marks and citation omitted).

Likewise, in *State v. Wallace*, 49 N.C. App. 475, 271 S.E.2d 760 (1980), the defendant based his appeal on his contention that a particular statute was unconstitutional on its face. This Court held:

While defendant’s argument is intriguing and unique, on the record before us we are not required to reach any constitutional question. A constitutional question will not be passed upon if there is also present some other ground upon which the case may be decided. If the case can be decided on one of two grounds, one involving a constitutional question, the other a question of lesser importance, the latter alone will be determined. The Court will not decide questions of a constitutional nature unless absolutely necessary to a decision of the case.

Id. at 484-85, 271 S.E.2d at 766. The Court then resolved the appeal on a non-constitutional basis because “[a]lthough counsel do not address [that] question, it arises on the face of the record.” *Id.* at 485, 271 S.E.2d at 766. *See also In re Byers*, 295 N.C. 256, 259, 244 S.E.2d 665, 668 (1978) (per curiam) (although respondent only raised constitutional issue on appeal, Supreme Court determined that appeal could be resolved on nonconstitutional basis and, therefore, “deem[ed] it inappropriate to consider the constitutional issue pre-

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sented by respondent's appeal"); *State v. Muse*, 219 N.C. 226, 227, 13 S.E.2d 229, 229 (1941) (although defendant, on appeal, sought to test constitutionality of act under which he was indicted, Supreme Court refused to address constitutional question because appeal could be resolved "on a question of less moment").

Here, based on these principles, I do not believe that a party should be able to effectively force a court to address a constitutional argument by stipulating that an otherwise unenforceable ordinance is enforceable. We should not leapfrog over the preliminary question of whether the Town of Woodfin had authority to adopt this ordinance in the first place simply because the parties invite us to do so. If the ordinance violates N.C. Gen. Stat. § 160A-174(b)(5), then it is "invalid and unenforceable." *Greene v. City of Winston-Salem*, 287 N.C. 66, 74, 213 S.E.2d 231, 235 (1975). *See also State v. Tenore*, 280 N.C. 238, 248, 185 S.E.2d 644, 651 (1972) (if town had no authority to adopt ordinance, it would be void, and no one could be punished for violating it).

As a result, any ruling on the constitutionality of the Town's ordinance would be unnecessary and amount merely to an advisory opinion. Yet, our appellate courts "never anticipate questions of constitutional law in advance of the necessity of deciding them, nor venture advisory opinions on constitutional questions." *Lueders*, 214 N.C. at 560, 200 S.E. at 23. *See also State v. Blackwell*, 246 N.C. 642, 644, 99 S.E.2d 867, 868 (1957) ("The constitutionality of a statute will not be considered and determined by the Court as a hypothetical question.").

Moreover, an opinion upholding the constitutionality of the ordinance would undoubtedly result in a flurry of enactments of similar ordinances across the State. Because, as I explain below, allowing municipalities and counties to adopt their own ordinances regulating sex offenders would interfere with the comprehensive state and federal legislation in this area, I do not believe we have the luxury to do as the parties urge and blithely move on to the more interesting constitutional issue.

**The Ordinance's Interference with the Comprehensive State
and Federal Regulation of Sex Offenders**

In *Craig v. County of Chatham*, 356 N.C. 40, 44, 565 S.E.2d 172, 175 (2002), the Supreme Court addressed N.C. Gen. Stat. § 160A-174(b)(5) and the question of how to determine whether the

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General Assembly “intended to implement statewide regulation in the area, to the exclusion of local regulation.” Municipalities have no inherent legislative powers, but rather “are instrumentalities of state government and possess only those powers the General Assembly has conferred upon them.” *Craig*, 356 N.C. at 44, 565 S.E.2d at 175. “In determining if the General Assembly intended to provide statewide regulation to the exclusion of local regulation, we must decide if it has shown a clear legislative intent to provide such a ‘complete and integrated regulatory scheme.’” *Id.* at 45, 565 S.E.2d at 176 (quoting N.C. Gen. Stat. § 160A-174(b)(5)).

In undertaking this task, it is immaterial that the General Assembly has not provided an express statement of intent. Instead, “[t]he General Assembly can create a regulatory scheme which, though not expressly exclusory, is so complete in covering the field that it is clear any regulation on the county level would be contrary to the statewide regulatory purpose.” *Id.* at 46, 565 S.E.2d at 176. “[W]e must primarily look to ‘the spirit of the act[] and what the act seeks to accomplish.’” *Id.* (second alteration original) (quoting *State v. Anthony*, 351 N.C. 611, 615, 528 S.E.2d 321, 323 (2000)).

In this case, we are confronted with comprehensive regulation of convicted sex offenders by both the federal government and the State of North Carolina. As our Supreme Court recently noted, Congress enacted legislation in 1994 that conditioned continued federal funding of state law enforcement on state adoption of sex offender registration laws. *State v. Bryant*, 359 N.C. 554, 559, 614 S.E.2d 479, 482 (2005). This legislation, the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (“the Jacob Wetterling Act”), Pub. L. No. 103-322, 108 Stat. 2038 (1994) (codified as amended at 42 U.S.C. § 14071 *et seq.* (2000)), also set minimum standards for the state programs. 42 U.S.C. § 14071(b). *See also Bryant*, 359 N.C. at 559, 614 S.E.2d at 482. The focus of this legislation was on statewide programs. By 1996, every state, the District of Columbia, and the federal government had enacted a sex offender registration and community notification program. *Id.*

The Jacob Wetterling Act was followed in 2006 by the Adam Walsh Child Protection and Safety Act, Pub. L. 109-248, 120 Stat. 587 (2006) (codified at 42 U.S.C. § 16901 *et seq.* (Supp. 2007)) (“the Adam Walsh Act”). The Adam Walsh Act states its purpose:

In order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent

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predators against the victims listed below, Congress in this Act *establishes a comprehensive national system* for the registration of those offenders.

42 U.S.C. § 16901 (emphasis added). As a condition of receiving certain law enforcement funding, 42 U.S.C. § 16925(a) (Supp. 2007), this Act imposes various obligations on “jurisdictions” with respect to convicted sex offenders. “Jurisdiction” is defined by the Act to mean the states, the District of Columbia, Puerto Rico, and various territories; it does not include local governmental bodies. 42 U.S.C. § 16911(10) (Supp. 2007).

In order to meet the Adam Walsh Act’s purpose of protecting the safety of the public from sexual predators, states are required, among other things, to make registration information available to the public on websites. 42 U.S.C. § 16918(d) (Supp. 2007). They must report information regarding sex offenders to the United States Attorney General, law enforcement agencies, school and public housing agencies, social services entities, and volunteer organizations in which contact with minors or other vulnerable individuals might occur. 42 U.S.C. § 16921(b) (Supp. 2007). Compliance may, however, be excused if the United States Attorney General determines that certain provisions would place the state in violation of its own constitution, as determined by a ruling of the state’s highest court. 42 U.S.C. § 16925(b)(1).

In addition, Congress has established the Sex Offender Management Assistance Program, 42 U.S.C. § 16926 (Supp. 2007), and the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking, 42 U.S.C. § 16945 (Supp. 2007). Finally, federal regulations prohibit a family’s admission to federally assisted housing if a member of the household is required to register as a sex offender on a lifetime basis. *See, e.g.*, 24 C.F.R. §§ 5.856, 882.518, 960.204, and 982.553 (Supp. 2007).

In 1995, North Carolina, consistent with the federal legislation, enacted the Amy Jackson Law, 1995 N.C. Sess. Laws ch. 545 (codified as amended at N.C. Gen. Stat. § 14-208.5 *et seq.* 2005). The General Assembly significantly amended this legislation in 2006. 2006 N.C. Sess. Laws ch. 247.

The General Assembly adopted this legislation for the following purpose:

The General Assembly recognizes that sex offenders often pose a high risk of engaging in sex offenses even after being

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released from incarceration or commitment and that protection of the public from sex offenders is of paramount governmental interest.

The General Assembly also recognizes that persons who commit certain other types of offenses against minors, such as kidnapping, pose significant and unacceptable threats to the public safety and welfare of the children in this State and that the protection of those children is of great governmental interest. Further, the General Assembly recognizes that law enforcement officers' efforts to protect communities, conduct investigations, and quickly apprehend offenders who commit sex offenses or certain offenses against minors are impaired by the lack of information available to law enforcement agencies about convicted offenders who live within the agency's jurisdiction. Release of information about these offenders will further the governmental interests of public safety so long as the information released is rationally related to the furtherance of those goals.

Therefore, it is the purpose of this Article to assist law enforcement agencies' efforts to protect communities by requiring persons who are convicted of sex offenses or of certain other offenses committed against minors to register with law enforcement agencies, to require the exchange of relevant information about those offenders among law enforcement agencies, and to authorize the access to necessary and relevant information about those offenders to others as provided in this Article.

N.C. Gen. Stat. § 14-208.5 (2005). North Carolina's sex offender registration law thus has two goals: (1) to generally protect the safety of the public, and (2) to assist law enforcement agencies.

In order to accomplish these goals, the General Assembly established two registration programs, with the second more stringent program directed at recidivists and sexually violent predators. *See* N.C. Gen. Stat. § 14-208.6A (2005).² As our Supreme Court summarized in *Bryant*, the "North Carolina Sex Offender and Public Protection Registration Program" requires:

every individual having a reportable conviction as defined by N.C.G.S. § 14-208.6, which includes offenses against minors and

2. The first category has a 10-year registration requirement, while the second category requires lifetime registration. N.C. Gen. Stat. § 14-208.6A. A third program governs juveniles not tried as adults. *See* N.C. Gen. Stat. § 14-208.26 (2005). Different registration requirements apply to the juveniles, and the information is released only to law enforcement rather than the public. N.C. Gen. Stat. § 14-208.29 (2005).

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“sexually violent offenses,” to register as a convicted sex offender with the sheriff of the county in which the person resides. N.C.G.S. § 14-208.7(a). If an individual convicted of such a crime moves to North Carolina “from outside this State, the person shall register within 10 days of establishing residence in this State, or whenever the person has been present in the State for 15 days, whichever comes first.” *Id.* Additionally, non-resident workers and students who have reportable convictions or are required to register as sex offenders in their resident state must also register as a convicted sex offender in the county in which they are employed or attend school. N.C.G.S. § 14-208.7(a1).

359 N.C. at 561, 614 S.E.2d at 483-84. The legislation requires the convicted sex offender to notify the sheriff of any change of address or status. N.C. Gen. Stat. § 14-208.9 (2005). There is a semiannual verification of that information, N.C. Gen. Stat. § 14-208.9A (2005), or a 90-day verification for more serious offenders, N.C. Gen. Stat. § 14-208.24 (2005). Violations of the registration requirements constitute a Class F felony. N.C. Gen. Stat. § 14-208.11 (2005).

The sheriff is required to obtain certain information from the registering sex offenders, including a current photograph, and for recidivists and sexually violent predators, additional information such as any treatment received. N.C. Gen. Stat. §§ 14-208.7, 14-208.22 (2005). Much of this information then becomes public record and is made available over the internet. N.C. Gen. Stat. §§ 14-208.10, 14-208.14 (2005).

In addition to the registration and notification requirements, the General Assembly has imposed geographical restrictions on convicted sex offenders. Under N.C. Gen. Stat. § 14-208.16(a) (Supp. 2006), “[a] registrant under this Article shall not knowingly reside within 1,000 feet of the property on which any public or nonpublic school or child care center is located.” A violation of this restriction is a Class G felony. N.C. Gen. Stat. § 14-208.16(f).³

Further, the General Assembly has limited the employment of convicted sex offenders and the ability of sex offenders to be in the presence of minors:

(a) It shall be unlawful for any person required to register under this Article to work for any person or as a sole proprie-

3. The General Assembly has also provided, however, that a landlord offering real property for rent or a person selling real property is not required to disclose that a person convicted of a crime for which registration is required resides near the property. N.C. Gen. Stat. §§ 39-50, 42-14.2 (2005).

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tor, with or without compensation, at any place where a minor is present and the person's responsibilities or activities would include instruction, supervision, or care of a minor or minors.

(b) It shall be unlawful for any person to conduct any activity at his or her residence where the person:

- (1) Accepts a minor or minors into his or her care or custody from another, and
- (2) Knows that a person who resides at that same location is required to register under this Article.

N.C. Gen. Stat. § 14-208.17(a), (b) (Supp. 2006). A violation of these restrictions is a Class F felony. N.C. Gen. Stat. § 14-208.17(c).

Finally, the General Assembly has directed that "[t]he Department of Correction shall establish a sex offender monitoring program that uses a continuous satellite-based monitoring system" to monitor sex offenders classified as a sexually violent predator or a recidivist and sex offenders convicted of an aggravated offense as defined in N.C. Gen. Stat. § 14-208.6. N.C. Gen. Stat. § 14-208.40(a) (Supp. 2006). Monitoring shall be for the person's natural life unless the requirement is terminated pursuant to N.C. Gen. Stat. § 14-208.43(a) (Supp. 2006).⁴ The monitoring must provide (1) "[t]ime-correlated and continuous tracking of the geographic location of the subject using a global positioning system based on satellite and other location tracking technology," and (2) "[r]eporting of subject's violations of prescriptive and proscriptive schedule or location requirements." N.C. Gen. Stat. § 14-208.40(c). Reporting may range from once a day to "near real-time." N.C. Gen. Stat. § 14-208.40(c)(2). A failure to enroll in this program when required to do so constitutes a Class F felony, while tampering with the monitoring device is a Class E felony. N.C. Gen. Stat. § 14-208.44 (Supp. 2006).

In conjunction with this specific program related to convicted sex offenders, the General Assembly has also set out special conditions of probation and post-release supervision for sex offenders. A defendant convicted of a reportable conviction under N.C. Gen. Stat. § 14-208.6(4) (2005) must, among other things, participate in evaluation and treatment as ordered by the court or the Post-Release Supervision and Parole Commission ("the Commission"); not reside in a household with any minor child if the offense involved evidence

4. Certain other offenders may be subject to a more limited time period of satellite-based monitoring. N.C. Gen. Stat. § 14-208.40(a)(2).

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of sexual abuse of a minor; and satisfy any other conditions determined by the court or the Commission to be reasonably related to the offender's rehabilitation or reintegration into society. N.C. Gen. Stat. §§ 15A-1343(b)(2), 15A-1368.4(b1) (2005).

In enacting their respective legislation, both Congress and our General Assembly recognized that they were required to balance the interest in public safety with individual rights that even a sex offender still possesses. Thus, Congress recognized that state constitutions might preclude some restrictions, and the General Assembly acknowledged that release of sex offender information must be "rationally related to the furtherance of [the] goals" of public safety. N.C. Gen. Stat. § 14-208.5.

As the Supreme Court stated in *Craig*, in deciding the applicability of N.C. Gen. Stat. § 160A-174(b)(5), we must "consider the breadth and scope of the applicable general statutes in determining whether the overall regulatory scheme was designed to be preemptive." 356 N.C. at 49, 565 S.E.2d at 178. Here, we have a federal program that states it is a "comprehensive national system," 42 U.S.C. § 16901, and that anticipates regulation *by the states* of convicted sex offenders. North Carolina's regulatory scheme in turn not only provides for registration and public identification of sex offenders on the internet with pictures and all pertinent information, but also restricts employment and location of residences and requires disclosure of otherwise private information to authorities. Perhaps most significantly, the legislation requires constant satellite monitoring of the most severe offenders with the result that, in North Carolina, it appears that law enforcement may track every step the sex offender takes. Moreover, courts, probation officers, and the Commission may impose further restrictions as necessary given the circumstances of the particular offender.

Local regulation would result in different regulations of sex offenders by city and by county. While the Town has chosen to bar sex offenders from parks, other local governments may bar them from libraries or other public buildings. Municipalities may attempt to impose residential or employment restrictions beyond those provided by state law or the offender's actual sentence, probation conditions, or Commission restrictions.

In holding that municipalities could not adopt their own employment discrimination ordinances, our Supreme Court noted that "[u]pholding the particularized laws in this case could lead to a balka-

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nization of the state's employment discrimination laws, creating a patchwork of standards varying from county to county" with the end result a "conglomeration of innumerable discordant communities." *Williams v. Blue Cross Blue Shield of N.C.*, 357 N.C. 170, 189, 581 S.E.2d 415, 428 (2003) (quoting *Idol v. Street*, 233 N.C. 730, 732, 65 S.E.2d 313, 315 (1951)). The same would be true here.

As our Supreme Court recognized in *Bryant*, our sex offender regulatory scheme depends in part on the fact that sex offenders cannot credibly claim ignorance of the law regarding restrictions imposed upon them. 359 N.C. at 568-69, 614 S.E.2d at 488-89. With the "balkanization" of regulation that will inevitably stem from a decision upholding the ordinance in this case, it will be difficult for anyone to know what "the law" is in North Carolina regarding convicted sex offenders. Moreover, the balance of public safety versus individual rights will vary in each municipality or county. *See Craig*, 356 N.C. at 48, 565 S.E.2d at 177-78 (noting the concern that rights would vary in different counties and upset the balance reached by General Assembly between economic interests and private property rights).

Further, if local regulation is allowed, one municipality could, in effect, shift the burden and risk of sex offenders from its geographical confines to other municipalities. Indeed, in this case, with the passage of the ordinance, plaintiff began looking at parks elsewhere in Buncombe County. This factor supports precluding local regulation of convicted sex offenders.

Finally, in a dramatic intrusion on the justice system, the conditions imposed upon a sex offender after release from custody will no longer be established by the court in imposing his sentence or setting the conditions for probation or by the Commission. Each local government may now weigh in on the appropriate conditions to be imposed upon sex offenders within that government's jurisdiction. This cannot be the law. *See State v. Burnett*, 93 Ohio St. 3d 419, 431-32, 755 N.E.2d 857, 868 (2001) (in holding that city lacked authority to enact an ordinance barring people convicted of a drug-related offense from a specified zone, stating that "there is no authority for the proposition that a municipality may, by way of ordinance, add a penalty for violation of a *state criminal statute* that is not otherwise provided for by the General Assembly"), *cert. denied*, 535 U.S. 1034, 152 L. Ed. 2d 649, 122 S. Ct. 1790 (2002).

In short, I believe that the State's regulation of convicted sex offenders is "so comprehensive in scope that the General Assembly

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must have intended that [the statutes] comprise a ‘complete and integrated regulatory scheme’ on a statewide basis, thus leaving no room for further local regulation.” *Craig*, 356 N.C. at 50, 565 S.E.2d at 179 (quoting N.C. Gen. Stat. § 160A-174(b)(5)). *See Greene*, 287 N.C. at 75-76, 213 S.E.2d at 237 (holding, based on “contextual reading of the relevant statutes,” that city ordinance requiring sprinklers was “invalid and unenforceable” in light of General Assembly’s legislation regarding the State Building Code). *See also Elwell v. Township of Lower*, 2006 WL 3797974, *11-13 (N.J. Super. Dec. 22, 2006) (holding that New Jersey’s Megan’s law, setting forth a system of registration for sex offenders, preempted town ordinance prohibiting registered sex offenders from residing or loitering within 500 feet of any school, park, playground, recreation area, or day care facility because state law constituted comprehensive legislation and uniformity is essential regarding post-conviction treatment of sex offenders). Accordingly, I would reverse the trial court’s order granting summary judgment to the Town and would direct entry of summary judgment in favor of plaintiff on the grounds that the ordinance violates N.C. Gen. Stat. § 160A-174(b)(5).

Inadequacy of Evidentiary Record Submitted
on Constitutional Question

If we do not address the Town’s lack of authority to adopt this ordinance, I cannot overlook the sketchiness of the record presented to the trial court and this Court with respect to the constitutional issue. Our Supreme Court has held that “constitutional analysis always requires thorough examination of all relevant facts.” *Anderson*, 356 N.C. at 416, 572 S.E.2d at 102. Accordingly, “[i]f the factual record necessary for a constitutional inquiry is lacking, an appellate court should be especially mindful of the dangers inherent in the premature exercise of its jurisdiction.” *Id.* at 416-17, 572 S.E.2d at 102 (internal quotation marks omitted). Even if we disregard the alternative statutory ground, I do not believe, under *Anderson*, that the factual record in this case is sufficient to resolve the constitutional issues raised by the parties.

While debating vigorously whether the ordinance is constitutional, the parties rely almost exclusively on various publications. These materials are simply included within the record on appeal unsupported by any expert testimony, such as an affidavit or a deposition. Some of the materials are printed from the internet with no explanation as to the identity of the source.

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Not just any material qualifies for consideration on a motion for summary judgment. A party cannot simply submit documents supporting his or its position without considering the Rules of Evidence. It is well established that “[o]n a motion for summary judgment the court may consider evidence consisting of affidavits, depositions, answers to interrogatories, admissions, documentary materials, facts which are subject to judicial notice, *and any other materials which would be admissible in evidence at trial.*” *Huss v. Huss*, 31 N.C. App. 463, 466, 230 S.E.2d 159, 161-62 (1976) (emphasis added). See also *Kessing v. Nat’l Mortgage Corp.*, 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971) (“Evidence which may be considered under Rule 56 includes admissions in the pleadings, depositions on file, answers to Rule 33 interrogatories, admissions on file whether obtained under Rule 36 or in any other way, affidavits, and any other material which would be admissible in evidence or of which judicial notice may properly be taken.”); *Deer Corp. v. Carter*, 177 N.C. App. 314, 325, 629 S.E.2d 159, 168 (2006) (“Our Supreme Court has held that in considering a Rule 56 motion for summary judgment, a trial court may consider material which would be admissible in evidence at trial.” (internal quotation marks omitted)); *Chicora Country Club, Inc. v. Town of Erwin*, 128 N.C. App. 101, 111, 493 S.E.2d 797, 803 (1997) (holding that party’s “attempt to amend the petition” was not material that would have been admissible in evidence and, therefore, trial court was not obliged to consider it when ruling upon motion for summary judgment).

Here, both parties blithely disregard the Rules of Evidence. Since “‘material offered which set[s] forth facts which would not be admissible in evidence should not be considered when passing on the motion for summary judgment,’” *Strickland v. Doe*, 156 N.C. App. 292, 295, 577 S.E.2d 124, 128 (quoting *Borden, Inc. v. Brower*, 17 N.C. App. 249, 253, 193 S.E.2d 751, 753, *rev’d on other grounds*, 284 N.C. 54, 199 S.E.2d 414 (1973)), *disc. review denied*, 357 N.C. 169, 581 S.E.2d 477 (2003), we—and the trial court—cannot similarly disregard the question whether these articles and internet publications would be admissible at trial. See *Smith v. Indep. Life Ins. Co.*, 43 N.C. App. 269, 276, 258 S.E.2d 864, 868 (1979) (exhibit that constituted hearsay “could not be considered by the trial court on motion for summary judgment”).⁵

5. But see *Lindsey v. N.C. Farm Bureau Mut. Ins. Co.*, 103 N.C. App. 432, 437, 405 S.E.2d 803, 805-06 (1991) (party could not object on appeal to contents of summary judgment affidavits when party did not object to affidavits before trial court).

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It cannot be disputed that the parties' articles and internet materials constitute hearsay. *See* N.C.R. Evid. 801(c) ("‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). Both parties have submitted these publications to prove "the facts" set forth within them. *See also Hickok v. G. D. Searle & Co.*, 496 F.2d 444, 446 (10th Cir. 1974) ("[I]t is well established that medical textbooks, treatises and professional articles are not freely admissible in evidence to prove the substantive or testimonial facts stated therein, since they are subject to the hearsay rule."); *Stang-Starr v. Byington*, 248 Neb. 103, 109, 532 N.W.2d 26, 30 (1995) ("When offered to prove the truth of matters asserted in them, learned writings, such as treatises, books, and articles regarding specialized areas of knowledge, are clearly hearsay.").

Our North Carolina appellate courts have held that such articles are admissible only under the learned treatise exception to the hearsay rule set forth in Rule 803(18). *See State v. Lovin*, 339 N.C. 695, 714, 454 S.E.2d 229, 240 (1995) (holding that because professional article was not shown to be learned treatise under N.C.R. Evid. 803(18), it was not admissible as substantive evidence); *Ferguson v. Williams*, 101 N.C. App. 265, 275, 399 S.E.2d 389, 395 (holding that excerpt from Physician's Desk Reference could be admitted only as a learned treatise), *disc. review denied*, 328 N.C. 571, 403 S.E.2d 510 (1991). Rule 803(18) provides that the following is not excluded as hearsay:

To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, *statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice.* If admitted, the statements may be read into evidence but may not be received as exhibits.

(Emphasis added.) In sum, the party offering the publication must demonstrate that it is a "reliable authority" through testimony or by judicial notice.

Neither party has made any attempt to establish through testimony that the materials fall within Rule 803(18). *Compare Sterling v. Gil Soucy Trucking, Ltd.*, 146 N.C. App. 173, 179-80, 552 S.E.2d 674, 678 (2001) (holding that article was properly admitted because

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expert witness testimony established article as reliable scientific authority). Nor is there any basis for a court to take judicial notice of the publications' reliability. Simply because a statistical analysis has been generated by the federal government—as is true of some of the materials—does not require the conclusion that experts in the field consider that analysis reliable or good science. Articles by the Justice Department are subject to critique by experts just like studies by scientists associated with universities or private research institutions.⁶

Alternatively, as the Tenth Circuit has pointed out, “expert witnesses are sometimes allowed to testify as to hearsay matters by discussing published materials, but this is allowed . . . solely to establish the basis for the expert’s opinion, and not to establish the veracity of the hearsay matters themselves.” *Hickok*, 496 F.2d at 447 (internal citation omitted). See also N.C.R. Evid. 703 (“The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.”); *State v. Oliver*, 85 N.C. App. 1, 13-14, 354 S.E.2d 527, 534-35 (doctor allowed to testify to body of literature accepted by her profession), *disc. review denied*, 320 N.C. 174, 358 S.E.2d 64 (1987). This Court has held, however, that a study by the American Medical Association and a press release by the North Carolina Department of Health and Human Services were not admissible in connection with a summary judgment motion when they were attached only to a lay witness’ affidavit and were not relied upon for purposes of an expert opinion. See *Duncan v. Cuna Mut. Ins. Soc’y*, 171 N.C. App. 403, 408, 614 S.E.2d 592, 596 (2005). Here, we do not even have a lay witness addressing the materials.

Because of the parties’ failure to establish the admissibility of these materials, they should not be considered on summary judgment. See, e.g., *Miskin v. Baxter Healthcare Corp.*, 107 F. Supp. 2d 669, 674 (D. Md. 1999) (plaintiff’s failure to demonstrate that two unauthenticated medical treatises qualified as learned treatises “ma[de] the treatises unauthenticated, inadmissible hearsay, which cannot be considered during summary judgment”), *aff’d*, 213 F.3d 632 (4th Cir. 2000); *Joiner v. General Elec. Co.*, 864 F. Supp. 1310, 1317 n.14 (N.D. Ga. 1994) (when plaintiff relied upon scientific publica-

6. There has also been no showing that the reports from the United States Justice Department fall within N.C.R. Evid. 803(8), providing a hearsay exception for certain public records and reports.

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tions to establish particular fact, but failed to present expert testimony that those materials constituted learned treatises under Rule 803(18), plaintiff failed to present admissible evidence on that point for purpose of summary judgment), *rev'd*, 78 F.3d 524 (11th Cir. 1996), *rev'd*, 522 U.S. 136, 139 L. Ed. 2d 508, 118 S. Ct. 512 (1997).

Even apart from the question of the admissibility of the materials, the lack of expert testimony is troubling. The materials contained in the record appear to represent statistical analyses and surveys of studies conducting statistical analyses. As Benjamin Disraeli, the British Prime Minister, reportedly proclaimed: "There are three kinds of lies: lies, damned lies, and statistics." The United States District Court for the District of South Carolina has stated the idea more tactfully: "It is undoubtedly true that statistical evidence is inherently malleable and subject to careful scrutiny." *Lott v. Westinghouse Savannah River Co., Inc.*, 200 F.R.D. 539, 546 (D.S.C. 2000). For that reason, the Fourth Circuit has held, with respect to employment discrimination claims, "if a plaintiff offers a statistical comparison without expert testimony as to methodology or relevance to plaintiff's claim, a judge may be justified in excluding the evidence." *Carter v. Ball*, 33 F.3d 450, 457 (4th Cir. 1994). *See also Lott*, 200 F.R.D. at 546 ("The general rule is that statistical evidence must be supported by expert testimony.").

Yet, in this case, no expert exists to address the reliability or meaning of these studies. "While all studies have flaws, some have more flaws than others. Study after study has found that many articles in the most prestigious medical journals are replete with shaky statistics and lack of any explanation of . . . critical matters . . ." Victor Cohn, *News & Numbers: A Guide to Reporting Statistical Claims and Controversies in Health and Other Fields* 10-11 (1989).

In this case, for example, both parties rely heavily upon an article from the United States Department of Justice: Patrick A. Langan, Ph.D., Erica L. Schmitt, and Matthew R. Durose, *Recidivism of Sex Offenders Released from Prison in 1994* (Nov. 2003). The parties ask us to accept this publication's reliability and authority on faith. I cannot do that. For example, this publication claims that since no sampling was used to select sex offenders for the study, "percentages in this report for sex offenders were not subject to sampling error." *Id.* at 39. Because, however, the text admits that not all sex offenders released were used in the review and because the analysis focuses only on sex offenders released in 1994 in 15 states, there was in fact some sampling, and expert testimony is necessary to evaluate

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whether the publication's assertion of no sampling error is reliable. In addition, the sample of non-sex offenders used appears to be significantly larger than the total number of sex offenders reviewed—a fact that an expert witness must assess to determine whether it undermines the validity of the inferences drawn. Finally, the publication asserts broadly—and without further explanation—that “[a]ll differences discussed were statistically significant at the .05 level.” *Id.* at 39. A basic principle of statistics, however, states that “[s]tatistical significance is not the same thing as practical significance.” David S. Moore and George P. McCabe, *Introduction to the Practice of Statistics* 474 (2d ed. 1993). There is, however, no expert witness for either party to explain the practical significance of the Justice Department report.

Certainly, the practical import of the parties' publications for the ordinance at issue in this case cannot be readily apparent to a lay person. As the United States Supreme Court has cautioned: “[S]tatistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances.” *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 340, 52 L. Ed. 2d 396, 418, 97 S. Ct. 1843, 1856-57 (1977). I would hold that the evidence presented below does not answer a fundamental question: What is the significance of these materials—none of them specifically addressing an ordinance such as the one at issue—with respect to the constitutional issues at hand?

We might conjecture or assume, but those are not bases for granting summary judgment as to the constitutionality of an ordinance. Under such circumstances, our courts have required expert testimony to guide the trier of fact. *See, e.g., Anderson v. Hous. Auth. of Raleigh*, 169 N.C. App. 167, 172, 609 S.E.2d 426, 429 (2005) (“Where a layperson can do no more than speculate as to the cause of a physical condition, the medical opinion of an expert is required to show causation.”); *Pitts v. Nash Day Hosp., Inc.*, 167 N.C. App. 194, 204, 605 S.E.2d 154, 160 (2004) (“Generally, expert testimony is required when the standard of care and proximate cause are matters involving highly specialized knowledge beyond that of laymen.”), *aff'd per curiam*, 359 N.C. 626, 614 S.E.2d 267 (2005).

Although I have an undergraduate degree in sociology that included a strong emphasis on empirical research, I would not presume to be able to assess the scientific reliability or meaning of the limited studies presented by the parties. Nor do I have any basis for deter-

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mining their practical significance for the constitutional issues involved in this case. These issues are of importance to citizens everywhere. They should not be resolved on a factual record as inadequate as the one presented in this case. I would hold that the evidence submitted by both parties—for the most part inadmissible at trial—is insufficient to resolve the case on summary judgment and remand for further proceedings during which the parties can build a proper record. In this appeal, we are presented with precisely the “dangers” of which the Supreme Court warned in *Anderson*.

On the Current Record, the Ordinance
Cannot Survive Strict Scrutiny

In any event, I cannot agree with the majority opinion’s analysis of the constitutional issues. Mr. Standley initially argues that the ordinance violates his right to travel. While courts across the country have split on the question whether the right to engage in intrastate travel is a fundamental constitutional right, the North Carolina Supreme Court has already answered that question.

In *State v. Dobbins*, 277 N.C. 484, 496, 178 S.E.2d 449, 456 (1971), our Supreme Court considered a curfew imposed by the City of Asheville when it “was faced with an imminent threat of widespread burning and other destruction of property, public and private.” The Court specifically held that “the right to travel upon the public streets of a city is a part of every individual’s liberty, protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and by the Law of the Land Clause, Article I, § 17, of the Constitution of North Carolina.” *Id.* at 497, 178 S.E.2d at 456. *See also id.* at 497, 178 S.E.2d at 457 (holding that the principles governing international travel “apply also to the effect of the Fourteenth Amendment upon state imposed restraints on intracity travel”).

Curiously, the majority does not address *Dobbins* in discussing Mr. Standley’s substantive due process claim, but rather relies on decisions from other jurisdictions. Only the Supreme Court, however, may overrule its own decisions.

The Town, on the other hand, suggests that *Dobbins* should be limited to public streets. Public parks are, however, frequently the heart of our communities and cannot reasonably be separated from other walkways. As the United States Supreme Court stated in *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 83 L. Ed. 1423, 59 S. Ct. 954 (1939), in striking down an ordinance:

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Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Id. at 515-16, 83 L. Ed. at 1436-37, 59 S. Ct. at 964. I can perceive no basis for holding that *Dobbins* does not apply to city parks as well as city streets.

The Town also argues that no “travel” is implicated because persons are not likely to be walking through the parks to get from one place to another. I know of no authority that supports such a limited view of “travel.” Indeed, as the Sixth Circuit has held, the right to travel locally “is fundamentally one of access.” *Johnson v. City of Cincinnati*, 310 F.3d 484, 495 (6th Cir. 2002), *cert. denied*, 539 U.S. 915, 156 L. Ed. 2d 130, 123 S. Ct. 2276 (2003). The Ohio Supreme Court has explained:

Every citizen of this state, much like the citizens of this Nation, enjoys the freedom of mobility not only to cross our borders into our sister states, but *also to roam about innocently in the wide-open spaces of our state parks* or through the streets and sidewalks of our most populous cities. This freedom of mobility is a tradition extending back to when the first settler crossed into what would eventually become this great state, and it is a tradition no Ohioan would freely relinquish.

Burnett, 93 Ohio St. 3d at 428, 755 N.E.2d at 865 (emphasis added). Mr. Standley, who is disabled, has been denied his access to the Town’s parks and has been prohibited from “roam[ing] innocently,” *id.*, through those parks accompanied by his mother. The ordinance, therefore, implicates his fundamental right to travel.

In *Dobbins*, the Supreme Court confirmed that it is for the courts to determine “the line between the right of the individual to travel

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and the authority of the State to limit travel.” 277 N.C. at 498, 178 S.E.2d at 457. The Court acknowledged that the right to intracity travel “may be regulated, as to the time and manner of its exercise, when reasonably deemed necessary to the public safety, by laws reasonably adapted to the attainment of that objective.” *Id.* at 497, 178 S.E.2d at 456. Nevertheless, “the right to travel on the public streets *is a fundamental segment of liberty* and, of course, the absolute prohibition of such travel requires substantially more justification than the regulation of it by traffic lights and rules of the road.” *Id.* at 499, 178 S.E.2d at 457-58 (emphasis added).

The ordinance at issue in this case is not a mere time and manner regulation of the right to travel, but rather is an “absolute prohibition” against registered sex offenders traveling into town parks. The question is not, therefore, whether the ordinance is “reasonably deemed necessary to the public safety.” *Id.* at 497, 178 S.E.2d at 456. Instead, we must apply strict scrutiny in reviewing the ordinance. “Ordinarily, where a fundamental liberty interest protected by the substantive due process component of the Fourteenth Amendment is involved, the government cannot infringe on that right ‘unless the infringement is narrowly tailored to serve a compelling state interest.’” *Johnson*, 310 F.3d at 502 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721, 138 L. Ed. 2d 772, 788, 117 S. Ct. 2258, 2268 (1997)). *See also Yeakle v. City of Portland*, 322 F. Supp. 2d 1119, 1128 (D. Or. 2004) (“Where an ordinance impairs a fundamental right, in order to pass constitutional muster, the government’s objective must be compelling and the relation between that objective and the means must be necessary.”); *Burnett*, 93 Ohio St. 3d at 428, 755 N.E.2d at 865-66 (“Any deprivation of the right to travel, therefore, must be evaluated under a compelling-interest test. Accordingly, the legislation must be narrowly tailored to serve a compelling governmental interest.” (internal citation omitted)).

Here, Mr. Standley does not dispute that the Town has a compelling interest in ensuring the safety of its citizens from sexual predators. The question before this Court is whether the record establishes that the ordinance is narrowly tailored to serve that interest. The record, however, contains no evidence at all supporting this second prong.

The Town relies exclusively on a single point: that there is evidence that sex offenders have a higher rate of recidivism and are more likely to commit another sex offense than non-sex offenders. The Town proclaims that sex offenders are “four times” as likely to

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commit another sex offense than a non-sex offender. It then contends that it adopted the ordinance in order to protect the public in light of this substantial risk from sex offenders. There is, however, a glaring gap in the Town's argument and proof.

The record contains no evidence that this particular ordinance serves that interest of protecting the public. The Town admits that no sex offenses committed by a registered sex offender have occurred in any of its parks.⁷ In addition, the Town has presented no evidence that sex offenses are likely to occur in parks. Indeed, the only evidence in the record on this point is contrary to the need for the Town's ordinance. In another United States Department of Justice report—Lawrence A. Greenfield, *Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault*, U.S. Department of Justice (Feb. 1997)—the Bureau of Justice Statistics reported that “[n]early 6 out of 10 rape/sexual assault incidents were reported by victims to have occurred in their own home or at the home of a friend.” *Id.* at 3. Another 10% of victims stated the crime occurred on a street away from home and 7.3% identified the site of the crime as a parking lot/garage. Parks were not separated out, but “[a]ll other locations” accounted for only 26.1% of the victimizations. *Id.* at 34. The record contains no evidence at all that sex offenses occur in parks with sufficient frequency to render the ban in this case an effective means of protection from sexual predators.

In addition, the same report states that “[a]bout two-thirds of rapes/sexual assaults were found to occur during the 12 hours from 6 p.m. to 6 a.m.” *Id.* at 3. Only 33% occurred between the hours of 6:00 a.m. to 6:00 p.m. *Id.* Significantly, the parties have stipulated that the park at issue in this case opens at sunrise and closes at sunset. The Town's evidence thus establishes that roughly one-third of rapes and sexual assaults occur during this time frame. When this evidence is considered in conjunction with the Town's evidence that only some very small unspecified percentage of rapes/sexual assaults occur in parks, then there is no intellectually honest basis for stating that the Town's ban on access to parks bears any significant relationship to the protection of citizens from sexual predators. *See Waters v. Barry*, 711 F. Supp. 1125, 1139 (D.D.C. 1989) (in holding juvenile curfew unconstitutional, pointing out that the record indicated that curfew bore “little relation to the nature of the problem,” since evidence showed that half of juvenile homicides occurred during non-curfew

7. One sexual crime did occur in a park, but the offender apparently was not registered. Thus, the ordinance would not have prevented that crime.

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hours and half occurred in juvenile's home, suggesting that measures such as the curfew "are simply not so closely related to the protection of minors, or to curing the city's problems with drugs and violence, as to justify the infringement of constitutional interests").

With respect to the efficacy of a park ban, the Town has not pointed to national statistics, the experiences of other municipalities, or even anecdotal evidence, such as the high profile cases reported in the media.⁸ *Compare Nunez v. City of San Diego*, 114 F.3d 935, 947-48 (9th Cir. 1997) (city presented several statistical reports demonstrating that juvenile curfew is a solution to rising juvenile crime and victimization). Further, the scary "four times as likely" to re-offend statistic that forms the entire basis for the Town's argument provides no support for the ordinance when actually examined. That figure comes from the *Recidivism of Sex Offenders Released from Prison in 1994* publication prepared by the U.S. Department of Justice Bureau of Justice Statistics. That report reviewed data relating to the recidivism of sex offenders released from state prisons in 15 states, including North Carolina, of which there were 9,691. Langan, *supra* at 1. During the same time frame, the 15 states released a total of 272,111 prisoners altogether. *Id.*

The portion of the report relied upon by the Town states in full:

Compared to non-sex offenders released from State prisons, released sex offenders were 4 times more likely to be rearrested for a sex crime. Within the first 3 years following their release from prison in 1994, 5.3% (517 of the 9,691) of released sex offenders were rearrested for a sex crime. The rate for the 262,420 released non-sex offenders was lower, 1.3% (3,328 of 262,420).

Id. (emphasis added). As discussed above, the practical significance of these results should be addressed in the first instance by expert testimony. Nevertheless, it still appears that, since there are far more non-sex offenders than there are sex offenders and the percentages are so very low, of the few sex offenses that might occur in one of the Town's parks, the offender would more likely be not registered as a sex offender. There were only 517 released sex offenders committing a sex crime while there were 3,328 non-sex offenders committing a sex crime. *Indeed, if we accept the Town's flawed analysis, we could boldly assert—although statisticians would surely cringe—that it*

8. I am not, however, suggesting that such media reports would necessarily meet the constitutional standard.

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is six times more likely that a given sexual assault would be committed by a non-sex offender. Of course, this highlights yet again the need for expert testimony.

The parties have submitted 204 pages of publications. I have reviewed every single page. Nowhere is there even a hint or suggestion that barring registered sex offenders from parks would protect the public's safety to any significant extent. "To be narrowly tailored, there must be an evidentiary nexus between a law's purpose and effect." *State v. J.D.*, 86 Wash. App. 501, 508, 937 P.2d 630, 634 (1997) (striking down curfew ordinance when record failed to show any nexus between curfew and juvenile crime rates). *See also Ass'n for Advancement of the Mentally Handicapped, Inc. v. City of Elizabeth*, 876 F. Supp. 614, 623 (D.N.J. 1994) (ordinance not justified even though it was directed at protecting community from harm because conditions in ordinance did not serve that interest in theory and in practice). The record in this case shows no evidentiary basis for concluding that the ordinance will have the effect of advancing the goal of protecting citizens from sexual predators.

I find the reasoning of the Sixth Circuit in *Johnson* and the Ohio Supreme Court in *Burnett* compelling. Each case considered Cincinnati's ordinance excluding people convicted of drug offenses from entering areas designated as drug-free zones. After holding that the City had a compelling interest in reducing drug abuse and drug-related crime—an interest comparable to the one at issue in this case—the Sixth Circuit concluded that the City had failed to present evidence that its ordinance was narrowly tailored to serve that interest. *Johnson*, 310 F.3d at 505. The Court pointed out that the ordinance excluded a person "without any particularized finding that [he or she] is likely to engage in recidivist drug activity" in the drug-free zone and prohibited that person "from engaging in an array of . . . wholly innocent conduct . . ." *Id.* at 503. To support this exclusion, the City "relie[d] on only general evidence that individuals arrested and/or convicted for drug activity in [the drug-free zone] typically return to the neighborhood and repeat their offenses." *Id.* In short, Cincinnati defended its exclusionary ordinance on the same basis that the Town does here.

The Sixth Circuit acknowledged that "[w]e, of course, 'do not demand of legislatures scientifically certain criteria of legislation.'" *Id.* at 504 (quoting *Ginsburg v. New York*, 390 U.S. 629, 642-43, 20 L. Ed. 2d 195, 205-06, 88 S. Ct. 1274, 1282 (1968)). Nevertheless, "when constitutional rights are at issue, strict scrutiny requires legislative

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clarity and evidence demonstrating the ineffectiveness of proposed alternatives.” *Id.* The court stressed: “In considering whether a government regulation is narrowly tailored, it is not enough that the regulation achieves its ostensible purpose, it must do so without unnecessarily infringing upon constitutionally protected rights.” *Id.* After noting that the city had only made conclusory claims that other efforts at battling drug crime were unsuccessful, the court concluded:

It is, of course, possible that a regulation like the Ordinance might be the narrowest method of addressing a seemingly uncontrollable drug and crime epidemic. But without some affirmative evidence that there is no less severe alternative, we cannot conclude that the Ordinance, in its present form, survives constitutional scrutiny.

Id. at 505.

The Ohio Supreme Court similarly pointed out that the ordinance “encroaches upon a substantial amount of innocent conduct and is not, therefore, narrowly tailored.” *Burnett*, 93 Ohio St. 3d at 430, 755 N.E.2d at 867. After reciting a number of innocent activities which were, as a result, now forbidden with respect to the people excluded from the drug-free zone, the court observed: “None of these activities are performed with illegal intention, yet a criminal penalty attaches to them without any evidence of illegality, or improper purpose, or a finding that the person is likely to commit future drug offenses.” *Id.* The court, therefore, held that while supported by a compelling interest, the ordinance was not narrowly tailored to address that interest since “[a] narrowly tailored ordinance would not strike at an evil with such force that constitutionally protected conduct is harmed along with unprotected conduct.” *Id.*

Here, even if we could assume that Woodfin’s ordinance might, to some limited extent, achieve its purpose of protecting its citizens from sexual predators, there has been even less of a showing of narrow tailoring than that presented by Cincinnati. The ordinance precludes registered sex offenders from engaging in a host of innocent activities, some of which would be entitled to their own constitutional protection, such as First Amendment activities or assembling with the public in a park for the Town’s Labor Day festivities. In contrast to Cincinnati, the Town here makes no attempt to argue that other alternative, less restrictive means would be ineffective to meet its interest in public safety. Indeed, the record contains no evidence that other alternatives were considered at any time.

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Other alternatives do in fact exist. For example, the Town could ban individual sex offenders based on conduct suggesting a risk of re-offending in the park. *See, e.g., Brown v. City of Michigan City*, 462 F.3d 720, 734 (7th Cir. 2006) (banning specific sex offender from park when he had been witnessed watching patrons of park through binoculars); *Doe v. City of Lafayette*, 377 F.3d 757, 773 (7th Cir. 2004) (“The City has banned only one child sex offender, Mr. Doe, from the parks, and they have banned Mr. Doe only because of his near-relapse in January of 2000 . . .”). The Town has also not considered the possibility of requiring a permit for registered sex offenders to enter the parks; of banning only those sex offenders most likely to re-offend, such as those required to register under the North Carolina Sexually Violent Predator Registration Program; of banning only persons convicted of certain types of sexual offenses; or of limiting the ban only to parks frequented by unaccompanied minors.⁹ Each of these options would be less restrictive than the comprehensive ban adopted by the Town.¹⁰

Thus, there is no basis in the record for concluding that this ordinance is narrowly tailored to serve the Town’s compelling governmental interest. *See Waters*, 711 F. Supp. at 1140 (in striking down juvenile curfew adopted to prevent crime, holding that “[b]ecause neither logic or [sic] the record permit the conclusion that the classification contained in the Act is narrowly tailored to achieve its expressed objectives, the Court concludes that the Act violates the equal protection component of the Fifth Amendment”). Even under a rational basis analysis, “vague, undifferentiated fears” regarding a particular group cannot support an ordinance. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 449, 87 L. Ed. 2d 313, 326, 105 S. Ct. 3249, 3259 (1985) (discussing ordinance as related to the mentally retarded).

We cannot simply say that conventional wisdom or commonsense suggests that the ordinance is needed. Not infrequently, the genesis of widely-held beliefs is fear not grounded in reality or science, but rather propagated by collective terror fueled by television or the internet. We cannot strip a whole group of people of a fundamental

9. It has been stipulated that the park visited by Mr. Standley and his mother contains no amenities for children.

10. I do not intend, by mentioning these options, to express an opinion on their constitutionality since the parties have not had an opportunity to address that question. I am simply demonstrating that options do exist that the Town could have considered. Its failure to consider any other option renders its ordinance constitutionally suspect.

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right based not on their individual behavior, but rather based simply on a desire to be seen as taking action to respond to the public's fear—especially when there is only the “belief” that such action might possibly make the community a little bit safer. If the record in this case is sufficient to uphold the Town's ordinance, we are indeed confronted with a slippery slope. Will municipalities next be allowed to bar other groups feared at times by the public—such as the mentally ill or handicapped, the homeless, gays, or people of middle eastern descent—because of the possibility that some individual members of those groups might in the future engage in unlawful conduct?

Nothing in *Dobbins* suggests that the ordinance is constitutional. The Supreme Court stressed: “We do not have before us a prolonged curfew, imposed by an unduly fearful or arbitrary official upon a serene and peaceful city engaged in its normal pursuits. We have before us a temporary prohibition of travel in a city faced with a clear and present danger of violent upheaval, accompanied by widespread destruction of property and personal injury.” 277 N.C. at 499, 178 S.E.2d at 458. The Court noted that the state and federal constitutions did not require the City of Asheville to wait to act until fires had been ignited and rioting commenced. *Id.* at 500, 178 S.E.2d at 458. Instead, “[a]ll that is required is the existence of a clear and present danger of such disastrous and unlawful conduct.” *Id.* Because, “according to the record before” the Court, that condition existed in Asheville at the time the curfew was proclaimed, the Court found the curfew constitutional. *Id.* *Dobbins* thus teaches that the record must demonstrate that there was, at the time the ordinance was adopted, a “clear and present danger” that a registered sex offender would re-offend in one of the Town's parks. No such evidence exists.

The fact that we are talking about convicted sex offenders does not negate constitutional principles. Our Supreme Court, acting 75 years ago, struck down an ordinance that prohibited “any lewd woman” from being on the public streets, in public places, or places of business. *See State v. Ashe*, 202 N.C. 75, 75, 161 S.E. 709, 709 (1932). In holding the ordinance unconstitutional, the Court stated:

However much they may have offended against the decencies of society, or run counter to the prevailing code of morals, or rendered themselves *non grata personae* to the community, still they are human beings, citizens of a great Commonwealth, and entitled to the equal protection of the laws.

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To deny to anyone, not lawfully imprisoned, the right to travel the highways, to buy goods, to eat bread, to attend Divine Worship, and the like, simply because he or she happens, for the time being, to belong to an unfortunate class, is an unwarranted use of the police power. Such an attempt at discrimination is unreasonable and in contravention of common right.

Id. at 76, 161 S.E. at 710 (emphasis added) (internal citation omitted). Surely, we have not—75 years later—so strayed from the groundings of our constitution that *Ashe's* view of what is an “unwarranted use of the police power” with respect to “lewd women” does not apply with equal force to sex offenders, the vast majority of whom will not re-offend.

Conclusion

The issue in this case is not whether sexual predators present a risk to our communities. They do. Nor is there any doubt about the ability of state and federal legislatures to act to protect their citizens from such predators. The primary question before this Court is whether the Town has the authority to impose its own regulatory scheme despite the comprehensive state and federal legislation adopted to serve the same purposes. Even if authority does exist, the question remains whether the means used by the Town is sufficiently necessary and tailored to override the rights of people who have already been punished for their crimes, who wish to engage in the innocent behavior of strolling through a park, and who have exhibited no behavior suggesting they will ever offend again.

A municipality should not be permitted to override fundamental constitutional rights based only on *perceived exigency*, without consideration of alternatives or efficacy. The public will believe itself safe, although it is not, and people who will never re-offend will be deprived of a fundamental right. I am confident we will come to regret allowing such action to be undertaken in the name of political expediency.

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KATE H. ELLISON, PLAINTIFF v. GAMBILL OIL COMPANY, INC., J. GWYN GAMBILL, INCORPORATED, JIM GAMBILL, GUNVANTPURI B. GOSAI AND B&B MINI MART, INC.; ARLIS TESTER D/B/A TESTERS GARAGE AND MUFFLER SHOP AND/OR TESTERS SHELL & MUFFLER SHOP, DEFENDANTS AND J. GWYN GAMBILL, INC., THIRD PARTY PLAINTIFF; JEFF BARRETT, DOING BUSINESS AS BARRETT PETROLEUM EQUIPMENT, THIRD PARTY DEFENDANT AND RUDRAM ENTERPRISES, INC., INTERVENOR

No. COA06-1016

(Filed 2 October 2007)

1. Environmental Law— underground storage tanks—gas leak—strict liability—third-party exception

The trial court erred by refusing to charge the jury on the third-party exception to the strict liability provisions of the North Carolina Oil Pollution and Hazardous Substances Control Act (OPHSCA) arising out of the contamination of plaintiff's well water with gasoline from the underground storage tanks located at defendant Mini Mart, and defendants are entitled to a new trial, because: (1) sufficient evidence was produced at trial to allow a reasonable inference from the jury that Barrett's actions were the cause of the discharge of gasoline; (2) a jury instruction as to Barrett's negligence did not correctly convey the exception; (3) there is no binding precedent showing a duty to affirmatively plead the exception, and while cases from other jurisdictions might be suggestive, they are not controlling; and (4) even if such affirmative pleading were required, the trial court granted a motion by Gosai and Mini Mart to amend its cross-claim to include Barrett, and copious evidence in the record existed that defendants several times mentioned Barrett as a third party whose acts or omissions might be considered to have intervened and thus relieved them of liability.

2. Appeal and Error— preservation of issues—denial of writ of certiorari

Although plaintiff contends under two cross-assignments of error that the trial court erred by granting a directed verdict for Gambill Oil Company, Inc. as well as a motion for directed verdict as to her claim of unfair and deceptive trade practices as to Gambill, Inc. and Jim Gambill, this issue is not addressed based on the Court of Appeals already denying plaintiff's petition for writ of certiorari to hear these arguments which were improperly preserved for appeal.

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3. Appeal and Error—preservation of issues—new trial

Defendant's remaining assignments of error are not addressed because the case has already been reversed and remanded for a new trial.

Judge JACKSON concurring in part and dissenting in part.

Appeal by defendants from judgment entered 31 August 2005 and from an order entered 10 November 2005 by Judge Charles Lamm in Watauga County Superior Court. Heard in the Court of Appeals 21 March 2007.

Sigmon, Clark, Mackie, Hutton, Hanvey & Ferrell, P.A., by Warren A. Hutton, Forrest A. Ferrell, and Nancy L. Huegerich, for plaintiff-appellee.

Vannoy & Reeves, PLLC, by Jimmy D. Reeves and M. Alexandra Reeves, for defendant-appellants J. Gwyn Gambill, Inc. and Jim Gambill; di Santi Watson Capua & Wilson, by Frank C. Wilson, III, for defendant-appellants Gunvantpuri B. Gosai and B&B Mini Mart, Inc.

HUNTER, Judge.

Defendants Jim Gambill ("Gambill"), Gunvantpuri B. Gosai ("Gosai"), and B&B Mini Mart, Inc. ("Mini Mart") (collectively "defendants"), appeal from the trial court's denial of their motions for directed verdict, judgment notwithstanding the verdict, and new trial. These defendants, along with defendant J. Gwyn Gambill, Incorporated ("Gambill Inc."), appeal the trial court's instructions to the jury as to punitive damages and an exception to the strict liability statute. After careful review, we find that the trial court erred in failing to instruct the jury on the exception to strict liability, and remand for a new trial.

In January 2005, Kate H. Ellison ("plaintiff") discovered her well water had been contaminated with gasoline. That gasoline was later determined to have leaked from the underground storage tanks located at the Mini Mart. After the leak was discovered, defendants hired Jeff Barrett ("Barrett"), who had installed a new monitoring system, sumps, and lines at the Mini Mart in May 2001, to perform whatever repairs were necessary to stop the leak. Plaintiff brought suit and after a jury trial was awarded \$500,000.00 from Gambill, Gambill Inc., Gosai, and the Mini Mart, including compensatory and punitive damages. Defendants appeal.

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[1] Defendants argue that the trial court's refusal to charge the jury on the third-party exception to the strict liability provisions of the North Carolina Oil Pollution and Hazardous Substances Control Act ("OPHSCA") is an error requiring remand for new trial. We agree.

The only basis for liability submitted to the jury was strict liability under OPHSCA, which states: "Any person having control over oil or other hazardous substances which enters the waters of the State . . . shall be strictly liable, without regard to fault, for damages to persons or property, public or private, caused by such entry[.]" N.C. Gen. Stat. § 143-215.93 (2005). Per N.C. Gen. Stat. § 143-215.77(5) (2005), "having control over" includes "any person[] using, transferring, storing, or transporting oil or other hazardous substances immediately prior to a discharge of such oil . . . into the waters of the State, and specifically shall include carriers and bailees of such oil[.]" *Id.*

A third-party exception is given by N.C. Gen. Stat. § 143-215.83(b)(2)(d) (2005), which states:

(b) Excepted Discharges.—This section shall not apply to discharges of oil or other hazardous substances in the following circumstances:

...

(2) When any person subject to liability under this Article proves that a discharge was caused by . . . :

...

(d) An act or omission of a third party, whether any such act or omission was or was not negligent.

Id.

When reviewing the refusal of a trial court to give certain instructions requested by a party to the jury, this Court must decide whether the evidence presented at trial was sufficient to support a reasonable inference by the jury of the elements of the claim. *Blum v. Worley*, 121 N.C. App. 166, 168, 465 S.E.2d 16, 18 (1995). If the instruction is supported by such evidence, the trial court's failure to give the instruction is reversible error. *Erie Ins. Exch. v. Bledsoe*, 141 N.C. App. 331, 335, 540 S.E.2d 57, 60 (2000). Thus, the appropriate inquiry here is whether evidence existed to support the request for an instruction on the third-party action exception. Because we believe such evidence did exist, we remand for a new trial.

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Testimony as to the physical cause of the leak was given by several individuals. Per Barrett's testimony, when he came to make repairs in January 2005, he found that the filters on one dispenser "had pinholes in them and were spraying gas into the sump." Evidence presented at the trial tended to show that gasoline then leaked into the surrounding area when a clamp on that sump failed to maintain a seal around the boot, the entry point for hoses into the sump.

All relevant testimony at trial agreed that this failure of the clamp to maintain a seal led to the leakage. Randy Cavallier, a geologist with the environmental consulting firm Gambill called in to assess the contamination, testified that he saw the sump in question and his understanding of the cause of the leak was a "bad clamp." Gambill testified that Barrett made three attempts to fix the leak by applying sealant around the boot, but Barrett was only successful in getting the sump to again hold liquid without leaking when he repaired the "stripped screw and clamp." Glen Howell, the lead maintenance person for Gambill Inc., testified that "the clamp was stripped" and the boot itself was installed backwards. Barrett himself acknowledged that the clamp was stripped. Further, when Barrett was asked whether the only thing he needed to do to fix the leak was to put in a new boot and new clamp, he answered: "That is the only way the gasoline was getting out of the sump."

It seems clear from the record that sufficient evidence was produced at trial to allow a reasonable inference by the jury that Barrett's actions were the cause of the discharge of gasoline. As such, failure to instruct the jury on the third-party exception to the strict liability statute was error.

Plaintiff argues that, even if such evidence existed, any error in omitting an instruction on the exception was harmless because the verdict sheet contained the following question as to Barrett's negligence: "**Issue 11:** Was the third party plaintiff, J. Gwyn Gambill, Inc., damaged by the negligence of the third party defendant, Jeff Barrett d/b/a Barrett Petroleum?" However, as noted above, the statutory exception reads: "When any person subject to liability under this Article proves that a discharge was caused by . . . [a]n act or omission of a third party, *whether any such act or omission was or was not negligent.*" N.C. Gen. Stat. § 143-215.83(b)(2)(d) (emphasis supplied). An instruction to the jury as to Barrett's negligence does not correctly convey the exception, and as such was inadequate.

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The dissent argues that, because Gosai and Mini Mart affirmatively pled the exception as to co-defendants Gambill and Gambill Inc. but not as to Barrett, Gosai and Mini Mart waived their right to ask for an instruction on the exception, regardless of whether the evidence warranted such an instruction.¹ However, this point is correct only if it is true that Gosai and Mini Mart were required to affirmatively plead the exception, and the dissent does not offer, nor do we find, any binding precedent showing a duty to affirmatively plead the exception. The only support for this statement that the dissent offers consists of cases from other jurisdictions wherein federal courts have made holdings under a federal statute, not our state courts making holdings under the OPHSCA. As such, while the cases might be suggestive were we to analogize their holdings to the statute at issue here, they are certainly not controlling. In this case, we choose not to follow them.

Further, even if such affirmative pleading were required, on 5 March 2004 the trial court granted a motion by Gosai and Mini Mart to amend its cross-claim to include Barrett. The amended cross-claim contained the following clauses:

16. Gambill and Barrett leaked, released, discharged or caused to be leaked, released, or discharged, without authorization or permit, hazard and toxic substances into or upon waters or land on or near the subject property.

17. Gambill and Barrett had control over the hazardous and toxic substances immediately prior to the leak, discharge and release into or upon waters or lands on or near the subject property.

18. Immediately after the leak, release, discharge, or immediately after becoming aware of the leak, release or discharge of hazardous and toxic substances into or upon waters or lands on or near subject property, Gambill and Barrett had the duty to undertake remedial actions to collect and remove the discharge and to remediate and restore the area affected by the discharge as nearly as may be to the condition existing prior to the discharge.

Again, in Gosai and Mini Mart's Requested Jury Charges submitted on 24 August 2005, they submitted the following: "Was the discharge of Gasoline . . . caused by an act or omission of a third party other than GB Gosai or B&B Minimart, Inc.[?]" The letter from their

1. It is worth noting that no party to this appeal argues or even suggests to this Court that any appellant has waived or failed to preserve for appeal the issue of failure to include the exception in jury instructions.

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attorney containing this request goes on to expound on the request by noting that there exists an exception to the strict liability statute saying that strict liability “does not apply when any person subject to liability under this Article, such as [Gosai or Mini Mart,] proves that a discharge was caused by an act or omission of a third party, whether any such act or omission was or was not negligent.” This, of course, is almost verbatim the exception in the statute, and at no point in the request are Gambill or Gambill Inc. mentioned as the third parties to whom the letter refers.

Again, in their motion for judgment notwithstanding the verdict or new trial filed on 8 September 2005, Gosai and Mini Mart state as partial grounds:

3. This Court erred in failing to charge the jury, as requested in writing by the Defendants B & B Mini Mart, Inc. and Gosai, that there was an exception to the Strict Liability provisions of the North Carolina Oil Pollution and Hazardous Substances Control Act set forth in N.C.G.S. § 143-215.83(2)(d). This Court should have instructed the jury that if B & B Mini Mart, Inc. and Gosai proved that the discharge of a hazardous substance was caused by an act or omission of a third party, strict liability would not apply. This was a correct statement of the law, presented to this Court in writing and was warranted under the facts presented to the jury.

Thus, copious evidence exists in the record that defendants Gosai and Mini Mart several times mentioned Barrett as a third party whose acts or omissions might be considered to have intervened and thus relieved them of liability. As such, we believe that, even were such a claim required to be affirmatively pled, defendants Gosai and Mini Mart have met that burden.

[2] Finally, we note that in her brief plaintiff argued, pursuant to two cross-assignments of error, that the trial court erred in granting a directed verdict for Gambill Oil Company, Inc. as well as the motion for directed verdict as to her claim of unfair and deceptive trade practices as to Gambill Inc. and Jim Gambill. Having already denied her petition for a writ of certiorari to hear these arguments, which were improperly preserved for appeal, we do not address them here.

[3] Because we reverse and remand for new trial on this assignment of error, we do not address defendant’s remaining assignments. *See, e.g., Lonon v. Talbert*, 103 N.C. App. 686, 697, 407 S.E.2d 276, 283 (1991).

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Reversed and remanded.

Judge TYSON concurs.

Judge JACKSON concurs in part and dissents in part in a separate opinion.

JACKSON, Judge concurring in part and dissenting in part.

I concur with the majority opinion that plaintiff's cross-assignments of error are not preserved for appellate review, and I further agree that the evidence in the instant case would support defendants' requested instruction on the third-party exception to strict liability under the North Carolina Oil Pollution and Hazardous Substances Control Act ("OPHSCA"), North Carolina General Statutes, sections 143-215.75 *et seq.* However, I believe that certain defendants—specifically, Gosai and the Mini Mart—waived the right to such an instruction by not affirmatively pleading and properly arguing the third-party exception, and accordingly, I dissent on this issue with respect to those particular defendants.

The OPHSCA provides an exception from strict liability for a hazardous substance discharge when the discharge is caused by "[a]n act or omission of a third party, whether any such act or omission was or was not negligent." N.C. Gen. Stat. § 143-215.83(b)(2)(d) (2001). This third-party exception, which defendants have the burden of proving, *see* N.C. Gen. Stat. § 143-215.83(b)(2) (2001), is in the nature of an affirmative defense. *See generally Estate of Smith v. Underwood*, 127 N.C. App. 1, 9, 487 S.E.2d 807, 813 (distinguishing between a rebuttal defense and an affirmative defense), *disc. rev. denied*, 347 N.C. 398, 494 S.E.2d 410 (1997). Construing section 143-215.83(b)(2)(d) as an affirmative defense is consistent with the interpretation of comparable statutes. *See, e.g., Elementis Chems., Inc. v. T.H. Agric. & Nutrition, L.L.C.*, 373 F. Supp. 2d 257, 264 (S.D.N.Y. 2005) (describing the exceptions to strict liability imposed by the federal Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9607—exceptions that are substantively similar to those in section 143-215.83(b)(2)—as affirmative defenses), *superseded in part on other grounds by Consol. Edison Co. of N.Y., Inc. v. UGI Utils., Inc.*, 423 F.3d 90 (2d Cir. 2005); *Grand St. Artists v. Gen. Elec. Co.*, 28 F. Supp. 2d 291, 295-96 (D.N.J. 1998) (same); *United States v. Stringfellow*, 661 F. Supp. 1053, 1062 (C.D. Cal. 1987) (same); *see also City of Brentwood v. Cent. Valley Reg'l Water Quality Control Bd.*,

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20 Cal. Rptr. 3d 322, 329-30 (Cal. Ct. App. 2004) (holding that exceptions—such as the act or omission of a third party—to strict liability under section 13385 of California’s Water Code are affirmative defenses).² Furthermore, it is well-established that failure to plead an affirmative defense constitutes a waiver of the defense. See N.C. Gen. Stat. § 1A-1, Rule 8(c) (2001); see also *Purchase Nursery, Inc. v. Edgerton*, 153 N.C. App. 156, 162, 568 S.E.2d 904, 908 (2002) (“‘Failure to raise an affirmative defense in the pleadings generally results in a waiver thereof.’” (quoting *Robinson v. Powell*, 348 N.C. 562, 566, 500 S.E.2d 714, 717 (1998))); *Underwood*, 127 N.C. App. at 9, 487 S.E.2d at 813 (noting that an affirmative defense needs to be specifically pled in the answer). Accordingly, defendants had the burden of pleading the third-party exception to strict liability under the OPHSCA.

On appeal, defendants contend that “the third party exception to the N.C. Oil Pollution and Hazardous Substances Control Act exempts *each Defendant-Appellant* from liability.” (Emphasis added). Defendants base their contention solely upon the acts or omissions of Barrett, whom Gambill Inc. hired to perform upgrades to the Mini Mart site, and argue that “[s]ufficient evidence was presented that action by a third party, *Barrett*, caused, or at a minimum, contributed to the subject discharge.” (Emphasis added).

With respect to the various defendants, Gambill and Gambill Inc. raised the issue of the third-party exception to strict liability in their answer. Specifically, Gambill and Gambill Inc. stated that “the truth is averred to be that the answering defendants are not strictly liable to the plaintiffs based on the *acts or omissions of the third party defendant, Jeff Barrett*, doing business as Barrett Petroleum Equipment.” (Emphasis added). Additionally, at trial and prior to the jury instructions, the attorney for Gambill and Gambill Inc. requested that the trial court include an instruction on the third-party exception to strict liability. Therefore, Gambill and Gambill Inc. preserved their

2. Although the majority takes issue with the citation to these cases and the failure to “offer any binding precedent,” citation to persuasive authority often is necessary in a case of first impression, such as the instant case. In fact, this approach has been utilized previously by this Court. See, e.g., *Skinner v. Preferred Credit*, 172 N.C. App. 407, 413, 616 S.E.2d 676, 680 (2005) (“Because this case presents an issue of first impression in our courts, we look to other jurisdictions to review persuasive authority that coincides with North Carolina’s law.”), *aff’d*, 361 N.C. 114, 638 S.E.2d 203 (2006); *Holroyd v. Montgomery County*, 167 N.C. App. 539, 544, 606 S.E.2d 353, 357 (2004) (“[A]lthough not controlling authority, decisions of our sister jurisdictions provide guidance on this question of first impression.”), *disc. rev. denied*, 359 N.C. 631, 613 S.E.2d 690 (2005).

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right to an instruction on the third-party exception, and accordingly, the majority correctly concludes that Gambill and Gambill Inc. are entitled to a new trial on the basis of the trial court's failure to instruct the jury on the third-party exception to strict liability under the OPHSCA.

Gosai and the Mini Mart also affirmatively pled the third-party exception:

Gosai affirmatively avers that Co-Defendants Gambill Oil Company, Inc., J. Gwyn Gambill, Incorporated, and Jim Gambill were solely and exclusively in control of and responsible for the USTs and UST systems located on the premises of B&B Mini Mart, Inc. *The release and/or discharge of any petroleum products* which resulted in contamination of the soils, subsoils, surface waters and ground waters within and without the property surrounding, and on which B&B Mini Mart is located *was as a sole, direct and proximate result of the negligent conduct of Gambill Oil Company, Inc., J. Gwyn Gambill, Incorporated, and Jim Gambill.*

(Emphases added). Gosai and the Mini Mart, however, have not argued on appeal that they were entitled to an instruction on the third-party exception based upon acts or omissions of "Gambill Oil Company, Inc., J. Gwyn Gambill, Incorporated, and Jim Gambill." Accordingly, this issue has not been preserved for appellate review. See N.C. R. App. P. 28(b)(6) (2006).

Instead, Gosai and the Mini Mart contend that they were entitled to the instruction on the third-party exception based upon *Barrett's* acts or omissions. Gosai and the Mini Mart, however, waived their right to such instruction. Specifically, the allegation against Gambill Inc. in their answer is insufficient to encompass Barrett's acts or omissions, since it is undisputed that Barrett acted as an independent contractor, not as Gambill Inc.'s agent. Although "the general agency doctrine . . . holds the principal responsible for the acts of his agent," *Hodge v. First Atlantic Corp.*, 6 N.C. App. 353, 356, 169 S.E.2d 917, 919 (1969), it is well-established that "torts committed by an independent contractor are not imputed to the employer." *Estate of Redding v. Welborn*, 170 N.C. App. 324, 330, 612 S.E.2d 664, 668 (2005). In fact, the attorney for Gosai and the Mini Mart acknowledged at trial that he only pled the third-party exception with respect to Gambill and Gambill Inc.:

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COURT: And you did not—did you allege an exception under the exception on affirmative defense in your answer or any other pleadings against Barrett?

[ATTORNEY FOR GOSAI AND THE MINI MART]: No, but against J. Gwyn Gambill, Inc. I did.

The majority notes, however, that the attorney for Gosai and the Mini Mart (1) filed an amended cross-claim against Barrett; (2) submitted a letter requesting a jury instruction that the discharge of gasoline was caused by the act or omission of a third party, without referencing any specific actor; and (3) made a motion for judgment notwithstanding the verdict on the grounds that the trial court erred in failed to instruct on the third-party exception, again without referencing any specific actor.

First, the contents of the letter concerning jury instructions and the motion for judgment notwithstanding the verdict are immaterial as to whether Gosai and the Mini Mart affirmatively pled the third-party exception. With respect to the cross-claim, although Gosai and the Mini Mart alleged facts sufficient for a finding that Barrett should be subject to strict liability, there is no allegation in the cross-claim that Gosai and the Mini Mart are exempted from strict liability because of Barrett's acts or omissions. The cross-claim does not seek to avoid liability for Gosai and the Mini Mart, but instead seeks to impose liability on Barrett. Further, even if the cross-claim included such an allegation, the trial court would have been required to "treat the pleading as if there had been a proper designation" of the affirmative defense only if justice required. N.C. Gen. Stat. § 1A-1, Rule 8(c) (2001). Finally, it must be noted that although Gosai and the Mini Mart amended their cross-claim, they made no attempt until the discussion on proposed jury instructions to amend their answer and the affirmative defense as originally pled, notwithstanding their statutory right to amend their pleadings. *See* N.C. Gen. Stat. § 1A-1, Rule 15(a) (2001). Although the attorney for Gosai and the Mini Mart made an oral motion to amend their answer during the conference on jury instructions, the trial court denied the motion, and it is well-settled that the "[d]enial of a motion to amend pleadings is a matter soundly within the discretion of the trial court." *Stetser v. TAP Pharm. Prods. Inc.*, 165 N.C. App. 1, 30, 598 S.E.2d 570, 589 (2004).

Ultimately, although counsel for Gosai and the Mini Mart argued to the trial court late in the trial proceedings—and again to this Court on appeal—that the trial court was required to instruct the jury on the

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third-party exception with respect to Barrett's acts or omissions, Gosai and the Mini Mart failed to affirmatively plead the exception with respect to Barrett and, therefore, waived the defense. Accordingly, both Gosai and the Mini Mart were not entitled to such an instruction, regardless of whether—as the majority opinion holds—the evidence would have supported such an instruction.

With respect to defendants' remaining arguments,³ defendants first contend that the trial court erred in denying their motions for directed verdict, judgment notwithstanding the verdict, and new trial, through which defendants argued that plaintiff failed to present sufficient evidence for the trial court to submit to the jury plaintiff's claims of strict liability under the OPHSCA. I disagree.

This Court's review of a trial court's ruling on a motion for directed verdict is *de novo*. See *Maxwell v. Michael P. Doyle, Inc.*, 164 N.C. App. 319, 323, 595 S.E.2d 759, 762 (2004). "Where the trial court finds there is more than a scintilla of evidence supporting each element of the plaintiff's claim, the motion for directed verdict should be denied." *Ward v. Beaton*, 141 N.C. App. 44, 47, 539 S.E.2d 30, 33 (2000), *appeal dismissed and cert. denied*, 353 N.C. 398, 547 S.E.2d 431 (2001). "A motion for a judgment notwithstanding the verdict is essentially the renewal of the directed verdict motion, and the standards are the same." *Bryant v. Thalheimer Bros., Inc.*, 113 N.C. App. 1, 6, 437 S.E.2d 519, 522 (1993), *appeal dismissed and disc. rev. denied*, 336 N.C. 71, 445 S.E.2d 29 (1994). The standard of review with respect to the trial court's denial of defendants' motion for new trial is abuse of discretion. See *In re Will of Buck*, 350 N.C. 621, 624, 516 S.E.2d 858, 860 (1999). Defendants, however, failed to present any argument in their brief with respect to their motion for new trial and the corresponding standard of review. Accordingly, this argument should be deemed abandoned. See N.C. R. App. P. 28(b)(6) (2006).

In the case *sub judice*, the only basis for liability submitted to the jury was strict liability under the OPHSCA, pursuant to which "[a]ny person having control over oil or other hazardous substances which enters the waters of the State in violation of this Part shall be strictly liable, without regard to fault, for damages to persons or property, public or private, caused by such entry, subject to the exceptions enumerated in [section] 143-215.83(b)." N.C. Gen. Stat. § 143-215.93 (2001).

3. As the majority correctly concludes, Gambill and Gambill Inc. are entitled to a new trial; this dissenting opinion addresses defendants' remaining arguments only insofar as they concern Gosai and the Mini Mart.

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“Having control over oil or other hazardous substances” shall mean, but shall not be limited to, any person, using, transferring, storing, or transporting oil or other hazardous substances immediately prior to a discharge of such oil or other hazardous substances onto the land or into the waters of the State, and specifically shall include carriers and bailees of such oil or other hazardous substances.

N.C. Gen. Stat. § 143-215.77(5) (2001). The definition of “oil” includes gasoline, *see* N.C. Gen. Stat. § 143-215.77(8) (2001), and “[w]aters” is broadly defined under [section] 143-215.77(18) as: ‘any stream, river . . . or any other body or accumulation of water, surface or underground, public or private, natural or artificial, which is contained within, flows through, or borders upon this State’” *Jordan v. Foust Oil Co., Inc.*, 116 N.C. App. 155, 160, 447 S.E.2d 491, 494 (1994) (alterations in original) (quoting N.C. Gen. Stat. § 143-215.77(18)), *disc. rev. denied*, 339 N.C. 613, 454 S.E.2d 252 (1995). *Jordan* specifically construed well water to fall within the purview of section 143-215.93. *See id.*

Defendants argue that Gosai and the Mini Mart are not subject to strict liability because plaintiff failed to present sufficient evidence that Gosai and the Mini Mart were “person[s] having control” of the hazardous substance pursuant to section 143-215.93. I disagree.

The OPHSCA subjects to strict liability those having control over hazardous substances immediately prior to a discharge, and persons “[h]aving control” include, but are “not . . . limited to, any person, using, transferring, storing, or transporting oil . . . immediately prior to a discharge of such oil.” N.C. Gen. Stat. § 143-215.77(5) (2001). The statute expressly excludes

any person supplying or delivering oil into a petroleum underground storage tank that is not owned or operated by the person, unless:

- a. The person knows or has reason to know that a discharge is occurring from the petroleum underground storage tank at the time of supply or delivery;
- b. The person’s negligence is a proximate cause of the discharge; or
- c. The person supplies or delivers oil at a facility that requires an operating permit under [section] 143-215.94U and

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a currently valid operating permit certificate is not held or displayed at the time of the supply or delivery.

Id.

In the instant case, the evidence demonstrates that (1) Gosai is the president of B&B Mini Mart, Inc., is the owner of the Mini Mart, and conducts the Mini Mart's day-to-day operations; and (2) the Mini Mart purchases gasoline from Gambill Inc., stores the gasoline in underground storage tanks, and sells the gasoline through its pumps. Further, the evidence shows that (1) Gosai worked with Gambill in upgrading the equipment at the Mini Mart; (2) Gosai contacted Gambill Inc. whenever the Mini Mart required additional deliveries of gasoline; (3) Mini Mart employees informed Gosai of the discrepancies in the gasoline records; (4) Gosai informed Gambill that the gas was "coming up short"; and (5) Maxie Jones, a Mini Mart employee, informed Gosai every time that the line leak alarm went off and the system needed to be reset. Although defendants emphasize that neither Gosai nor the Mini Mart owned either the underground storage tanks or the tract of land on which the Mini Mart was located, this Court has clarified that an ownership interest is not dispositive of "control." See *Foust Oil Co.*, 116 N.C. App. at 161-62, 447 S.E.2d at 495. Further, neither Gosai nor the Mini Mart are exempted from the definition of persons "[h]aving control" over hazardous substances on the grounds that they do not own the underground storage tanks, because even if they could be considered to be "person[s] supplying or delivering oil," the evidence demonstrated that both Gosai and the Mini Mart knew or had reason to know of the discharge from the underground tanks. N.C. Gen. Stat. § 143-215.77(5)(a) (2001).

As this Court noted in *Foust*, the legislature intended the OPHSCA to have a "broad reach" and "'having control over oil or other substances' is . . . broadly defined." *Foust Oil Co.*, 116 N.C. App. at 165, 447 S.E.2d at 497. Here, the evidence demonstrates that Gosai and the Mini Mart had control over the gasoline at issue, and therefore, Gosai and the Mini Mart properly are subject to strict liability under the OPHSCA.

Defendants, nevertheless, contend that even if the evidence supports a determination of strict liability, the third-party exception to strict liability prevents them from being held liable and that the trial court, therefore, erred in denying their motions. However, as discussed *supra*, Gosai and the Mini Mart failed to preserve their argu-

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ment with respect to an instruction on the third-party exception. Accordingly, I would overrule defendants' argument.

In their final argument, defendants contend that the trial court erred by instructing the jury on punitive damages. I disagree.

"It is the duty of the trial court to instruct the jury on the law with regard to every substantial feature of the case." *Anderson v. Austin*, 115 N.C. App. 134, 136, 443 S.E.2d 737, 739, *disc. rev. denied*, 338 N.C. 514, 452 S.E.2d 806 (1994). Punitive damages, which may be appropriate "to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts," N.C. Gen. Stat. § 1D-1 (2001), "may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded: (1) [f]raud[;] (2) [m]alice[;] [or] (3) [w]illful or wanton conduct." N.C. Gen. Stat. § 1D-15(a) (2001). "Willful or wanton conduct" is defined as "the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm. 'Willful or wanton conduct' means more than gross negligence." N.C. Gen. Stat. § 1D-5(7) (2001). If the defendant is a corporate entity, the party seeking punitive damages must prove that "the officers, directors, or managers of the corporation participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages." N.C. Gen. Stat. § 1D-15(c) (2001).

"[P]unitive damages may . . . be awarded only if a plaintiff can prove willful or wanton conduct (or fraud or malice) by clear and convincing evidence." *McNeill v. Holloway*, 141 N.C. App. 109, 114, 539 S.E.2d 309, 312 (2000). In reviewing a trial court's decision to give or not give a jury instruction, this Court must determine "whether, in the light most favorable to the proponent, the evidence presented [wa]s sufficient to support a reasonable inference of the elements of the claim asserted." *Blum v. Worley*, 121 N.C. App. 166, 168, 465 S.E.2d 16, 18 (1995); *accord Yancey v. Lea*, 354 N.C. 48, 52, 550 S.E.2d 155, 157 (2001). Specifically, "when 'more than a *scintilla* of evidence exist[s] from which the jury could find that defendant's [tortious conduct] was accompanied by a reckless disregard for [plaintiff's] rights,' a punitive damages charge is warranted." *Blum*, 121 N.C. App. at 169, 465 S.E.2d at 18 (emphasis added) (first alteration in original) (quoting *Lee v. Bir*, 116 N.C. App. 584, 589, 449 S.E.2d 34, 36 (1994), *cert. denied*, 340 N.C. 113, 454 S.E.2d 652 (1995)).

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In the instant case, defendants contend that plaintiff failed to present any, much less sufficient, evidence to support an instruction on punitive damages against the Mini Mart. Defendants contend that the evidence showed that the Mini Mart (1) “obeyed orders from . . . government officials”; (2) “followed all State guidelines and regulations”; and (3) “was never asked . . . to participate in any remedial measures at the site.”

Plaintiff, however, contends that the evidence demonstrated that the Mini Mart had both actual and constructive knowledge of the gasoline leaks but “ignored or concealed this knowledge and continued to pump gasoline” to the point that plaintiff’s water was so contaminated that she was instructed not to use her water for any purpose. Plaintiff’s contention is supported by the evidence discussed *supra*, and it is well-settled that “[t]he weight of the evidence [i]s for the jury.” *Parnell v. Wilson*, 252 N.C. 486, 487, 114 S.E.2d 114, 115 (1960) (per curiam). Plaintiff presented sufficient evidence—certainly more than the required scintilla—to support a reasonable inference of each of the necessary elements for an award of punitive damages against the Mini Mart. Accordingly, the trial court properly instructed on punitive damages with respect to the Mini Mart.

Defendants also assign error to the following emphasized portion of the trial court’s instructions concerning punitive damages:

If you decide, in your discretion, to award punitive damages, any amount you award must bear a rational relationship to the sum reasonably needed to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts. In making this determination, you may consider only that evidence which relates to[:] the reprehensibility of the defendant[s’] conduct; the likelihood, at the relevant time, of serious harm to the plaintiff or others similarly situated; the degree of the defendant[s’] awareness of the probable consequences of [their] conduct; the duration of the defendant[s’] conduct; the actual damages suffered by the plaintiff; *any concealment by the defendant[s] of the facts or consequences of [their] conduct; whether the defendant[s] profited by the conduct; [and] the defendant[s’] ability to pay punitive damages, as evidenced by [their] revenues or net worth.*

(Emphasis added). The trial court’s instruction was based upon North Carolina General Statutes, section 1D-35(2). On appeal, de-

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fendant contends that there was not sufficient evidence to support the factors related to concealment and profit. *See* N.C. Gen. Stat. § 1D-35(2)(f), (h) (2001).

It is incumbent upon defendants to show prejudice as a result of the trial court's including these factors in its instruction. *See Word v. Jones ex rel. Moore*, 350 N.C. 557, 565, 516 S.E.2d 144, 148 (1999). As explained by our Supreme Court, "Rule 61 of the North Carolina Rules of Civil Procedure provides that erroneous jury instructions are not grounds for granting a new trial unless the error affected a substantial right. In other words it must be shown that a different result would have likely ensued had the error not occurred." *Id.* (internal quotation marks and citations omitted). However, in their brief, defendants have failed to explain how they were prejudiced by the inclusion of the factors listed in subsections (f) and (h) and have failed to demonstrate that a different result likely would have been reached at trial. Accordingly, this assignment of error should be overruled.

Based upon the foregoing, I would hold that the trial court properly (1) refused to instruct the jury on the third-party exception to strict liability with respect to Gosai and the Mini Mart; (2) denied defendants' motions for directed verdict and judgment notwithstanding the verdict with respect to Gosai and the Mini Mart; and (3) instructed the jury on punitive damages with respect to the Mini Mart. Accordingly, I would affirm in part and reverse in part.

STATE OF NORTH CAROLINA, PLAINTIFF v. RONALD GRAHAM, JR., DEFENDANT

No. COA06-837

(Filed 2 October 2007)

**1. Sentencing— aggravating factors—not submitted to jury—
special verdict**

There was no plain error in sentencing this defendant between the decision in *Blakely* and the legislation expressly authorizing the submission of aggravating factors to a jury. The court submitted the aggravating factors to the jury by means of a special verdict.

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2. Evidence— victim impact—admission at guilt phase—no prejudice

The trial court erred, but there was no prejudice, where it admitted testimony from an assault victim's mother about how witnessing the attack had affected her mental health. This was victim impact evidence which was improper at the guilt phase because it did not depict the context or circumstances surrounding the commission of the crime, and did not have any tendency to prove that defendant was the intruder. However, given the considerable evidence of defendant's guilt, there was no reasonable possibility of another verdict without the testimony.

3. Constitutional Law— pre-arrest silence—cross-examination—no error

There was no error where the trial court allowed the State to cross-examine defendant about his pre-arrest silence. The State was within its constitutional boundaries.

4. Assault— knife as deadly weapon—evidence of serious wounds sufficient

The trial court did not err by instructing the jury that a knife was a deadly weapon where the knife was neither introduced nor described in detail, but there was uncontroverted evidence that the victim suffered life-threatening injuries, including a collapsed lung and nine stab wounds that required closure in a hospital operating room.

5. Evidence— instantaneous conclusion—door kicked in

Testimony from officers at a burglary and assault scene that the front door had been forced or kicked in was admissible as a shorthand statement of fact because it constituted instantaneous conclusions drawn by the witnesses upon seeing the splintered door and the door frame ajar but still bolted.

6. Burglary— instructions—intent controverted—misdemeanor breaking or entering as lesser included offense

The trial court did not err in a first-degree burglary prosecution by not instructing the jury on felonious breaking or entering. When the State established all of the elements of first-degree burglary except intent, it also established all of the elements of felonious breaking or entering except intent. The court correctly instructed on the lesser included offense of misdemeanor breaking or entering.

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Appeal by defendant from judgments entered 9 November 2005 by Judge Jerry R. Tillett in Pasquotank County Superior Court. Heard in the Court of Appeals 19 February 2007.

Attorney General Roy A. Cooper, III, by Assistant Attorney General K. D. Sturgis, for the State.

Linda B. Weisel, for defendant-appellant.

STROUD, Judge.

Defendant Ronald Graham, Jr., appeals from judgments entered pursuant to convictions for first-degree burglary and assault with a deadly weapon with intent to kill inflicting serious injury (AWDWIK-ISI) in Pasquotank County Superior Court. Defendant contends that the trial court erred when it: (1) submitted aggravating factors to the jury and imposed a greater than presumptive sentence upon the jury's finding of one of the aggravating factors beyond a reasonable doubt; (2) admitted victim impact evidence at the guilt-innocence phase of the trial, specifically evidence of the impact of the crimes on the mental health of Lorine Spence; (3) allowed the State to cross-examine defendant about his pre-arrest exercise of the right to silence; (4) instructed the jury that a knife is a deadly weapon; (5) allowed two law enforcement officers to testify that the door of the home of Lorine Spence was forced open; and (6) failed to instruct the jury on the lesser included offense of felonious breaking or entering. After carefully reviewing the record, we conclude that defendant received a fair trial, including sentencing, free of prejudicial error.

I. Background

On the night of 30 December 2004, Demetrius Spence (victim) was sleeping on a sofa in the home of his mother, Lorine Spence (Ms. Spence). Around midnight, defendant and James Ferebee broke the door and entered the home. Once inside, defendant stabbed the victim multiple times with a knife. The victim was taken to the hospital for treatment in the operating room of nine stab wounds, and a collapsed lung. Ms. Spence was present in the room during the incident, and she required mental health treatment as a result of witnessing the attack. Defendant fled the State to nearby Virginia after perpetrating the crime, and subsequently fled to Alabama when news of the crime was publicized in Virginia. He was arrested in Alabama.

On 28 February 2005, the Pasquotank County Grand Jury indicted defendant for first-degree burglary and AWDWIKISI. He was tried be-

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fore a jury in Pasquotank County Superior Court on 8 and 9 November 2005. Defendant was found guilty of both crimes. Thereafter, the trial court sentenced defendant to 133 to 169 months for AWDWIKISI and to an enhanced sentence of 146 to 185 months for first-degree burglary, the two sentences to be served consecutively. Defendant appeals.

II. Discussion

A. Sentence Enhancement

[1] Defendant first contends that the trial court lacked jurisdiction to submit aggravating factors to the jury and impose an enhanced sentence based on an aggravating factor found by the jury beyond a reasonable doubt. Specifically, defendant offers the following syllogism: First, he argues that *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), recognizes the constitutional right to have aggravating factors proved to a jury before an enhanced sentence can be imposed. Second, he argues that absent an express statutory command, a trial court has no jurisdiction to submit aggravating factors to a jury. Therefore, he argues, all aggravated sentences are unconstitutional for crimes committed after *Blakely* was decided but before the General Assembly revised N.C. Gen. Stat. § 15A-1340.¹ to expressly authorize submission of aggravating factors to a jury.

Defendant urges us to conduct a *de novo* review of this alleged jurisdictional question. We note initially that though defendant uses the word “jurisdiction,” his brief alleges no facts which would have deprived the trial court of jurisdiction.² Properly characterized, defendant has assigned error to the constitutional propriety of the trial court’s consideration of aggravating factors in sentencing. He did not raise this constitutional question to the trial court, therefore, we will review only for plain error. *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779-80 (1997); N.C.R. App. P. 10(c)(4).

1. N.C. Gen. Stat. § 15A-1340.16 gives the trial court the authority to impose enhanced sentences based on the finding of aggravating factors.

2. Jurisdiction is “the power to hear and to determine a legal controversy; to inquire into the facts, apply the law, and to render and enforce a judgment.” *High v. Pearce*, 220 N.C. 266, 271, 17 S.E.2d 108, 112 (1941) (citation and quotation omitted); *State v. Batdorf*, 293 N.C. 486, 493, 238 S.E.2d 497, 502 (1977) (“Jurisdictional issues . . . relate to the authority of a tribunal to adjudicate the questions it is called upon to decide.”). “The superior court has ‘exclusive, original jurisdiction’ to try defendants accused of felonies,” *State v. Bell*, 121 N.C. App. 700, 701, 468 S.E.2d 484, 485 (1996) (quoting N.C. Gen. Stat. § 7A-271(a)), *cert. denied*, 483 S.E.2d 180 (1997), occurring in this State, *Batdorf*, 293 N.C. at 493, 238 S.E.2d at 502. It is undisputed that defendant was accused of a felony which occurred in Pasquotank County, North Carolina.

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As defendant correctly asserts, *Blakely* held that before an aggravated sentence may be imposed, the Sixth Amendment grants “every defendant . . . the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment.” 542 U.S. at 313, 159 L. Ed. 2d at 420 (emphasis in original).

However, *Blakely* expressly declined to declare judicial discretion in sentencing to be unconstitutional; it “limit[ed] judicial power only to the extent that the claimed judicial power infringes on the province of the jury” to find facts essential to the defendant’s punishment. 542 U.S. at 308-09, 159 L. Ed. 2d at 417.

At the time *Blakely* was decided, the law in North Carolina granted discretion to the trial court to impose an enhanced sentence, on the condition that “[t]he State . . . prov[es] by a preponderance of the evidence that an aggravating factor exists.” N.C. Gen. Stat. § 15A-1340.16(a) (2003). Our Supreme Court subsequently held that *Blakely* did not nullify N.C. Gen. Stat. § 15A-1340.16 in its entirety, but instead declared unconstitutional only those portions which authorized the trial judge to enhance a sentence based on aggravating factors found by the judge by a preponderance of evidence and not found by a jury. See *State v. Allen*, 359 N.C. 425, 449, 615 S.E.2d 256, 272 (2005), *withdrawn*, 360 N.C. 569, 635 S.E.2d 899 (2006); see also *State v. Lucas*, 353 N.C. 568, 598, 548 S.E.2d 712, 732 (2001) (“*Apprendi* [the precursor of *Blakely*] d[id] not declare N.C.G.S. § 15A-1340.16A unconstitutional, but instead require[d] that the State meet the requirements set out in . . . *Apprendi* in order to apply the enhancement provisions of the statute.”). Our Supreme Court also recognized that even before N.C. Gen. Stat. § 15A-1340.16³ was amended to expressly authorize the submission of aggravating factors to the jury,

North Carolina law independently permit[ed] the submission of aggravating factors to a jury using a special verdict. . . . It is difficult to imagine a more appropriate set of circumstances for the use of a special verdict than [to] safeguard[] [a] defendant’s right to a jury trial [on aggravating factors] under *Blakely*.

State v. Blackwell, 361 N.C. 41, 46-48, 638 S.E.2d 452, 456-57 (2006), *cert. denied*, — U.S. —, 167 L. Ed. 2d 1114 (2007).⁴ We conclude

3. The 2005 amendment to N.C. Gen. Stat. § 15A-1340.16 provides that “[i]f the defendant does not . . . admit [to the existence of an aggravating factor], only a jury may determine if an aggravating factor is present in an offense.” N.C. Gen. Stat. § 15A-1340.16(a1).

4. Defendant urges us to ignore *State v. Blackwell*, and declare the use of a special verdict in the instant case unconstitutional, but “[i]t is elementary that this Court

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that the trial court in the case *sub judice* did not violate defendant's constitutional right to a jury trial when it submitted aggravating factors to the jury by means of a special verdict. To the contrary, the trial court was scrupulously protecting defendant's constitutional right to a jury trial, exactly as *Blakely* required, when it relied on the jury's findings to aggravate defendant's sentence. Because no *Blakely* error was identified at all, there could be no plain error, and defendant's assignment of error is without merit.

B. Victim Impact Evidence

[2] Defendant next assigns error to the admission of testimony from Ms. Spence as to how witnessing the attack on her son had affected her mental health. Defendant, relying on *State v. Maske*, 358 N.C. 40, 50, 591 S.E.2d 521, 527-28 (2004), contends that evidence of the effect of the incident on Ms. Spence was victim impact evidence, and therefore irrelevant to determining his guilt or innocence. The testimony assigned as error was elicited by the State as follows:

Q. Is there anything different about your life now as opposed to before this happened to you?

[Defense Counsel]: Objection.

THE COURT: Overruled. Well, counsel approach.

(Counsel for the State and Counsel for Defendant approached the bench. Whereupon an off-the-record discussion was held.)

THE COURT: You may continue.

...

A. Well, it has sent me to the psychiatrist.

Q. Tell me about that.

A. [...] I done been there a lot of times. I still have appointments with him now.

Q. Now, when you go see the psychiatrist, where do you go?

A. [...] Albemarle Mental Health.

Q. Did you go see a psychiatrist before this happened?

A. No.

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Q. [. . .] What made you decide that you wanted to go see a psychiatrist? What is going on with you?

A. Because I can't sleep. I keep having nightmares about what's happened that night. I can't even rest.

Q. What else?

A. [. . .] I just have nightmares.

Q. Have your sleep habits changed at all?

[Defense Counsel]: Objection to the leading.

[Witness starts to talk over.]

THE COURT: Sustained as to the form.

Q. Have you had any other changes concerning any of your daily habits or routines?

A. When I go out and I go to the American Legion Hut, I just plays—I usually go there and you know, what you call party-ing and dancing, but I don't do that anymore. . . .

Q. Did you do that more often before this happened?

. . .

A. Yes, I went there all of the time.

Q. Do you stay by yourself now?

. . .

[Defense Counsel]: Objection to the leading, the constant leading.

THE COURT: Overruled with some limited latitude.

A. Me and my little grand boy.

Q. All right. And do you do anything with regard to securing your house before you go to sleep?

[Defense Counsel]: Objection to the leading.

[Witness starts to talk over.]

THE COURT: Well, overruled, but limited latitude.

. . .

A. I puts [sic] some of my stuff up to my doors. I am still scared . . .

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Q. Like what kind of stuff?

A. Like I put chairs there to the front and back on the latch and I have got another lock on the door.

...

Q. And what has changed about your sleep habits, if anything?

A. I can't sleep. I don't sleep much. I don't sleep no time hardly

Q. [. . .] What made you decide after this happened that you needed to see anybody [at Albemarle Mental Health]?

A. Because I couldn't rest. I just can't rest. I just go to sleep and wake back up. I just keep seeing what is happening, you know, to my son. I keep on having that dream or whatever about it.

Q. And has that made you want to do anything?

A. It sure do. It sure did.

Q. Such as what?

A. It is a lot that I just had on my mind to do that I really wanted to do, if I could.

...

A. Because I wanted to get them back for doing that to my son. I really did. I wanted to get them back so bad I don't know what to do.

Q. And what about things with regard to yourself?

A. Sometimes I feel like doing something to my own self

Q. Okay. And what causes you to feel that way?

A. I just don't know. Because I couldn't help him at that time. That's what hurts me so bad. I couldn't help him.

The State argues that defendant's sole objection early in the line of questioning was not sufficient to properly preserve this issue for appellate review. However, a "sole [improperly overruled] objection . . . to a single line of questioning at one instance in the trial" is sufficient to preserve the entire line of questioning for appellate review, if the same evidence is not "admitted on a number of occasions throughout the trial." *State v. Brooks*, 72 N.C. App. 254, 258, 324

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S.E.2d 854, 857 (citing N.C. Gen. Stat. § 15A-1446(d)(10)), *disc. review denied*, 313 N.C. 331, 327 S.E.2d 901 (1985). Because we believe, for the reasons that follow, that defendant's objection was improperly overruled, we will review the entire line of questioning.

A trial court errs when it admits irrelevant evidence. N.C. Gen. Stat. § 8C-1, Rule 402 ("Evidence which is not relevant is not admissible."). " 'Relevant evidence' means evidence having *any* tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401; *see also State v. Sloan*, 316 N.C. 714, 724, 343 S.E.2d 527, 533 (1986) ("Evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue in the case."); *State v. Whiteside*, 325 N.C. 389, 397, 383 S.E.2d 911, 915 (1989) (holding that "circumstantial evidence tending to connect an accused with the crime" is relevant).

Victim impact evidence includes evidence of "physical, psychological, or emotional injury, [or] economic or property loss suffered by the victim." N.C. Gen. Stat. § 15A-833 (2005). Victim impact evidence also includes evidence of the effect of the crime on the victim's family, including the psychological and financial effect. *See, e.g., State v. Allen*, 360 N.C. 297, 309-10, 626 S.E.2d 271, 282 (evidence that victim's mother was devastated and suffered panic attacks is victim impact evidence), *cert. denied*, — U.S. —, 166 L. Ed. 2d 116 (2006); *State v. Roache*, 358 N.C. 243, 315, 595 S.E.2d 381, 426-27 (2004) (evidence of physical, psychological, and emotional repercussions of murders on victims' family members is victim impact evidence); *State v. Barden*, 356 N.C. 316, 369-70, 572 S.E.2d 108, 141-42 (2002) (evidence that victim had a wife and child who depended on him for financial support is victim impact evidence), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003).

Victim impact evidence is generally relevant and admissible in sentencing, though its admissibility in sentencing "is limited by the requirement that the evidence not be so prejudicial it renders the proceeding fundamentally unfair." *Allen*, 360 N.C. at 310, 626 S.E.2d at 282; N.C. Gen. Stat. § 15A-833. However, the effect of a crime on a victim's family often has no tendency to prove whether a particular defendant committed a particular criminal act against a particular victim; therefore victim impact evidence is usually irrelevant during the guilt-innocence phase of a trial and must be excluded. *Maske*, 358 N.C. at 50, 591 S.E.2d at 527-28 (assuming without deciding that brief testimony from murder victim's sister about the effect of the crime on

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her and her children was irrelevant at the guilt-innocence phase of the trial, but holding that admission of the evidence was harmless).

However, victim impact evidence which tends to show the context or circumstances of the crime itself, even if it also shows the effect of the crime on the victim and his family, is an exception to the general rule, and such evidence is relevant and therefore admissible at the guilt-innocence phase,⁵ providing, of course, that it is not subject to one of the admissibility exceptions of Rule 402.⁶ *Barden*, 356 N.C. at 349-50, 572 S.E.2d at 130-31 (evidence that murder victim sent money to his wife and child is victim impact evidence, but also tends to show how the victim handled his money, and is therefore relevant to guilt or innocence because it helps explain the circumstances of the crime); *accord State v. Agee*, 326 N.C. 542, 546-49, 391 S.E.2d 171, 173-75 (1990) (recognizing that otherwise collateral evidence is relevant when it tends to establish the context of the crime); *see also Payne v. Tenn.*, 501 U.S. 808, 823, 115 L. Ed. 2d 720, 734 (1991) (“In many cases the evidence relating to the victim is . . . relevan[t] at the guilt phase of the trial.”); *id.* at 840-41, 115 L. Ed. 2d at 746 (Souter, J., concurring) (“[T]he usual standards of trial relevance afford fact finders enough information about surrounding circumstances to let them make sense of the narrowly material facts of the crime itself.”); *Booth v. Maryland*, 482 U.S. 496, 507, 96 L. Ed. 2d 440, 451 n.10 (1987) (declaring victim impact evidence inadmissible at death penalty sentencing, but conceding that some victim impact evidence “may well be admissible because [it] relate[s] directly to the circumstances of the crime.”), *overruled by Payne v. Tenn.*, 501 U.S. 808, 115 L. Ed. 2d 720 (1991) (even though *Payne* expressly overruled *Booth* and allowed victim impact evidence at sentencing, *Payne* cited *Booth* to note that victim impact evidence which also concerned the circumstances of the crime was relevant to determining guilt or innocence

5. Some jurisdictions have dealt with this distinction by concluding that evidence about the effect of the crime on the victim which also concerns the circumstances of the crime is not victim impact evidence by definition, rather than labeling it victim impact evidence and then excepting it from the general rule. *See, e.g., State v. Bennett*, 632 S.E.2d 281, 286 (S.C.) (holding that the testimony of the victims’ mothers, which was limited to the circumstances surrounding the assault and battery of their sons and the extent of the injuries suffered thereby was not victim impact evidence, and therefore not irrelevant at the guilt-innocence phase), *cert. denied*, — U.S. —, 166 L. Ed. 2d 530 (2006).

6. “All relevant evidence is admissible, *except* as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules.” N.C. Gen. Stat. § 8C-1, Rule 402 (emphasis added).

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both before and after *Booth*); *State v. Fautenberry*, 650 N.E.2d 878, 882-83 (Ohio) (holding that evidence which depicted both the circumstances surrounding the commission of the murder and also the impact of the murder on the victim's family is victim impact evidence, but is also relevant during the guilt-innocence phase), *cert. denied*, 516 U.S. 996, 133 L. Ed. 2d 439 (1995).

At closing argument, the State made specific reference to the above-quoted testimony, calling Ms. Spence a second victim of the crimes. We conclude that this portion of the testimony of Ms. Spence was victim impact evidence. Therefore, it would be relevant and admissible at the guilt-innocence phase of the trial only if it also depicted the context or circumstances surrounding the commission of the crime. However, there is nothing in this entire line of questioning which depicts the context or circumstances surrounding the commission of the crime. The quoted testimony does not have any tendency to prove that defendant was the intruder who broke into the home of Lorine Spence around midnight on 30 December 2004 and stabbed Demetrius Spence. Consequently, the admission of this testimony was error.

Having concluded that the trial court erred by admitting the foregoing evidence of the effect that the attack on Demetrius Spence had on the mental health of his mother, Ms. Spence, we now consider if it was reversible error which would entitle defendant to a new trial. N.C. Gen. Stat. § 15A-1447(a) (2005). Reversible error is present when " 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached.' " *State v. Williams*, 322 N.C. 452, 456-57, 368 S.E.2d 624, 627 (1988) (quoting N.C. Gen. Stat. § 15A-1443(a)).

Examining the entire record, we find that the State presented extensive evidence from two eyewitness who were well-acquainted with defendant and who positively identified him at trial, and evidence that defendant fled to Alabama shortly after hearing that the crime had been publicized. In light of the considerable evidence of defendant's guilt, we cannot say as a matter of law that absent the erroneous admission of victim impact evidence, there is a reasonable possibility that the jury's verdict would have been different. *State v. Robbins*, 319 N.C. 465, 502, 356 S.E.2d 279, 301, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987). This assignment of error is overruled.

C. Right to Remain Silent

[3] Defendant assigns error to the following testimony, elicited by the State on cross-examination of defendant.

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Q. When you found out what you were charged with, did you go tell the police “no I didn’t have a weapon. No, this didn’t happen?”

A. If I had done that, I might as well—

Q. My question was, did you go and do it?

A. No ma’am.

Defendant, relying on *State v. Elmore*, 337 N.C. 789, 792, 448 S.E.2d 501, 502-03 (1994) (holding that police testimony containing a brief and indirect mention of the defendant’s silence during police questioning was harmless error), argues that the above-quoted testimony was plain error because it is well-established “that a criminal defendant’s exercise of his constitutionally protected right[] to remain silent . . . may not be used against him at trial.” *Id.* at 792, 448 S.E.2d at 502. Defendant further relies on *State v. Lane*, 301 N.C. 382, 384, 271 S.E.2d 273, 275 (1980), which held that the admission of evidence of defendant’s post-arrest silence as to his alibi was prejudicial error, and *State v. Quick*, 337 N.C. 359, 365-67, 446 S.E.2d 535, 539-40 (1994), which granted a new sentencing hearing to the defendant on other grounds, but held that the trial court erred when it allowed the State to question both the defendant and a police investigator at trial about the defendant’s silence when asked during a post-arrest interrogation, “how does it feel to kill a . . . man?” and then allowed the State to refer to this silence in closing argument at sentencing. Defendant also cites *State v. Durham*, 175 N.C. App. 202, 204-06, 623 S.E.2d 63, 65-66 (2005) (holding that it is prejudicial error for the State’s closing arguments to make reference to the defendant’s post-arrest silence), *State v. Shores*, 155 N.C. App. 342, 346, 573 S.E.2d 237, 242 (2002) (holding that the State’s questions to defendant and police officer about defendant’s silence after his arrest and the State’s reference in closing argument to defendant’s silence amounted to prejudicial error), and *State v. Ward*, 354 N.C. 231, 266, 555 S.E.2d 251, 273 (2001) (holding that it was prejudicial error for the State’s closing argument in the sentencing phase of a capital murder trial to assert that defendant kept silent because he did not want to incriminate himself).

In response, the State argues that it was entitled to test the credibility of defendant’s testimony, because “[a] testifying defendant is subject to impeachment by cross-examination generally to the same extent as any other witness,” *State v. Lester*, 289 N.C. 239, 245, 221

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S.E.2d 268, 272 (1976), especially when it concerns his silence before he was arrested, *Jenkins v. Anderson*, 447 U.S. 231, 238, 65 L. Ed. 2d 86, 94 (1980) (holding that cross-examination of a defendant about his pre-arrest silence regarding his defense of self-defense did not violate his right to silence under the Fifth Amendment).

When a criminal defendant testifies in his own behalf, “he waives his constitutional privilege not to answer questions tending to incriminate him.” *State v. Griffin*, 201 N.C. 541, 542, 160 S.E. 826, 827 (1931). Further, a testifying criminal defendant is subject to cross-examination, *id.*, and “may be asked impeaching questions,” *id.* at 543, 160 S.E. at 827. Questions about the defendant’s silence *before* he was arrested are not prohibited, *Lane*, 301 N.C. at 384-85, 271 S.E.2d at 275 (citing *Jenkins v. Anderson*), though a defendant may not be impeached by inquiries into his refusal to answer questions after he has been arrested. 301 N.C. at 385, 271 S.E.2d at 275.

None of the cases that defendant relies on are apposite, because those cases declare unconstitutional prosecutorial questions about a defendant’s silence *after* his arrest, or to the State’s reference to a defendant’s silence in closing argument, not as here, where the State briefly *cross-examined* defendant about his *pre-arrest* silence. The State was within its constitutional boundaries when it questioned defendant during cross-examination about his silence before he was arrested, and we hold that the trial court did not err in permitting the State to do so.

D. Knife as a Deadly Weapon

[4] Defendant next contends that the trial court erred when it instructed the jury that a knife is a deadly weapon. Defendant argues that when the State does not produce the actual knife, or describe it in detail at trial, the trial court may not instruct the jury that the knife allegedly used is a deadly weapon.

However, “[t]he deadly character of the weapon depends sometimes more upon the manner of its use, and the condition of the person assaulted, than upon the intrinsic character of the weapon itself.” *State v. McKinnon*, 54 N.C. App. 475, 477, 283 S.E.2d 555, 557 (1981) (citation and quotation omitted) (holding that a small pocketknife is a deadly weapon when the stab wound results in a punctured lung). “Where the victim has in fact suffered serious bodily injury or death, the courts have consistently held that a knife is a dangerous or deadly weapon *per se* absent production or detailed description.” *State v.*

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Smallwood, 78 N.C. App. 365, 369, 337 S.E.2d 143, 145 (1985); *see also State v. Lednum*, 51 N.C. App. 387, 390, 276 S.E.2d 920, 922-23 (evidence of victim's week-long hospitalization, including treatment with intravenous glucose, stitches and a tube in his lung, and evidence of victim's month-long absence from work were sufficient for the trial court to instruct the jury that a knife is a deadly weapon, even though the knife was not produced at trial and the size of the knife was disputed), *disc. review denied*, 303 N.C. 317, 281 S.E.2d 656 (1981).

In the instant case, the knife was not introduced into evidence at trial, nor was it described in detail. However, the State introduced uncontroverted evidence that victim suffered life-threatening injuries, including a collapsed lung and nine stab wounds which required closure in a hospital operating room. The serious nature and extent of these injuries was sufficient for the trial court to instruct the jury that the knife used was a deadly weapon. This assignment of error is without merit.

E. Evidence that the Door was Forced Open

[5] Defendant next argues that the trial court erred when it admitted the following testimony from Deputy Randy Smithson: "When I got there, I noticed . . . [t]hat the front door had been forced open It was clear to me that the front door had been forced," and similar testimony from Officer Ashley Burge: "[S]omebody had kicked in the door The door had actually been locked to where when the door was kicked in, the deadbolt was still in the locked position but had pushed through the doorframe." Defendant argues that this testimony was inadmissible because it is improper lay opinion in violation of Rule 701 of the North Carolina Rules of Evidence.

It is well-settled that

[t]he instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time, are, legally speaking, *matters of fact*.

State v. Lloyd, 354 N.C. 76, 109, 552 S.E.2d 596, 620 (2001) (emphasis added) (citation and quotation omitted). These instantaneous conclusions are often referred to as "shorthand statements of fact," and are not subject to the limits on lay opinion testimony found in Rule 701. *State v. Braxton*, 352 N.C. 158, 187, 531 S.E.2d 428, 445 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001). This rule

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applies even if the instantaneous conclusion is also an element of the charged offense. *State v. Daye*, 83 N.C. App. 444, 445-46, 350 S.E.2d 514, 515-16 (1986) (holding that the witness's conclusion that defendant concealed merchandise, stated as the witness described defendant rolling up clothes and putting them in her pocketbook, was admissible in defendant's trial for willfully concealing merchandise).

The above-quoted testimonial statements, considered in light of the context, were simply instantaneous conclusions drawn by the witnesses upon seeing the door standing ajar but still bolted, and the splintered door frame. The testimony of each witness was a short-hand statements of fact and therefore not barred by Rule 701. The trial court did not err in admitting it.

F. Omission of Instruction for Felonious Breaking or Entering

[6] Defendant next assigns error to the trial court's failure to instruct the jury on the lesser included offense of felonious breaking or entering. The trial court must instruct on a lesser included offense when "there is evidence from which the jury could find that defendant committed the lesser included offense [unless] the State's evidence is positive as to every element of the crime charged and there is no conflicting evidence relating to any element of the crime charged." *State v. Boykin*, 310 N.C. 118, 121, 310 S.E.2d 315, 317 (1984).

The essential elements of first-degree burglary are "(1) the breaking and entering (2) of an occupied dwelling of another (3) in the nighttime (4) with the intent to commit a felony therein." *State v. Robinson*, 97 N.C. App. 597, 602, 389 S.E.2d 417, 420, *disc. review denied and appeal dismissed*, 326 N.C. 804, 393 S.E.2d 904 (1990). Felonious breaking or entering is "break[ing] or enter[ing] any building [including a dwelling] with intent to commit any felony or larceny therein." N.C. Gen. Stat. § 14-54(a) (2005). Misdemeanor breaking or entering is "wrongfully break[ing] or enter[ing] any building." N.C. Gen. Stat. § 14-54(b) (2005).

Breaking is defined as

any act of force, however slight, employed to effect an entrance through any usual or unusual place of ingress, whether open, partly open, or closed. A breaking may be actual or constructive. A defendant has made a constructive breaking when another person who . . . is acting in concert with the defendant actually makes the opening.

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State v. Bray, 321 N.C. 663, 673, 365 S.E.2d 571, 577 (1988) (internal citations and quotations omitted). Acting in concert means that the defendant is “present at the scene of the crime” and acts “together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.” *State v. Joyner*, 297 N.C. 349, 357, 255 S.E.2d 390, 395 (1979).

The uncontroverted evidence in the record, testified to by the eyewitnesses and by defendant is that: defendant and James Ferebee went during the night, to a dwelling occupied by victim and his mother. The door was closed when they arrived; either defendant or James Ferebee kicked open the door. This was a breaking. It is immaterial, on these facts, whether defendant or Ferebee applied the force necessary to open the door. If Ferebee applied the force, it is uncontroverted that he and defendant were acting in concert. Defendant and Ferebee entered through the open door.

The State therefore established by positive and uncontroverted evidence that defendant and Ferebee broke and entered the dwelling of Lorine Spence during the nighttime. The only element of first-degree burglary which is controverted is defendant’s intent when he entered the home. The State’s evidence tended to establish that defendant and Ferebee were armed and entered the home with the intent to commit the felony of AWDWIKISI. Defendant testified that at the time he and Ferebee entered, he was unarmed and had no intention other than peacefully resolving a pre-existing dispute with victim. Because the State established all the elements of first-degree burglary, except the intent with which defendant entered the home, with positive and uncontroverted evidence, it also established the elements of felonious breaking or entering except for intent. It was therefore not error for the trial court to omit an instruction for the lesser included offense of felonious breaking or entering. Instead, because the evidence as to defendant’s intent was circumstantial and controverted, the trial court was required to instruct on the lesser included offense of misdemeanor (non-felonious) breaking or entering, which it did. We conclude that the trial court did not err when it omitted a jury instruction on felonious breaking or entering.

III. Conclusion

The trial court did not err when it (1) submitted aggravating factors to the jury via a special verdict and imposed a greater than presumptive sentence on defendant upon the jury’s finding of one of those factors beyond a reasonable doubt; (2) allowed the State to

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cross-examine defendant about his pre-arrest silence; (3) instructed the jury that the a knife was a deadly weapon; (4) allowed two law enforcement officers to testify that the door to Ms. Spence's home was forced open; and (5) failed to instruct the jury on the lesser included offense of felonious breaking or entering.

We also conclude that the trial court erred by allowing the State to elicit testimony about the effect of the crime on Ms. Spence when that testimony had no tendency to show the context or circumstances of the crime. However, that error did not prejudice defendant, because there was no reasonable possibility that the outcome of the trial would have been different absent the admission of this evidence. Accordingly, we hold that defendant received a fair trial, free of prejudicial error.

NO PREJUDICIAL ERROR.

Chief Judge MARTIN and Judge HUNTER concur.

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No. COA06-1496

(Filed 2 October 2007)

1. Appeal and Error— appealability—denial of motion to stay—necessity for petition for writ of certiorari

In an action in which plaintiff second tier subcontractor seeks to enforce its statutory mechanic's lien against the property owner, contractor, and contractor's surety for rental equipment furnished to a first tier site preparation subcontractor, defendants have no right to appeal from the trial court's failure to grant their motion for a stay pending final disposition of a bankruptcy action filed by the first tier subcontractor because they failed to petition for a writ of certiorari as required by N.C.G.S. § 1-75.12(c). Furthermore, defendants' appeal from the denial of their motion to stay will not be treated as a petition for a writ of certiorari because plaintiff does not attempt to collect sums due from the first tier subcontractor which filed for bankruptcy but seeks to enforce its statutory lien claim against other defendants.

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2. Liens— second tier subcontractor—claim of lien on funds—summary judgment improper

Summary judgment for plaintiff second tier subcontractor cannot be sustained on the basis of a claim of lien on funds under N.C.G.S. § 44A-18(2) in an action in which plaintiff seeks to enforce a statutory lien against the property owner, contractor and contractor's surety for rental equipment furnished to a first tier subcontractor because a genuine issue of material fact exists as to whether an unpaid contract balance remains between the contractor and the first tier subcontractor where defendants asserted in interrogatories that the contractor owed no money to the first tier subcontractor because the remaining contract balance was depleted by costs incurred by the contractor to complete the subcontractor's contractual obligations due to its default.

3. Liens— second tier subcontractor—claim of lien on property—summary judgment improper

Summary judgment for plaintiff second tier subcontractor cannot be sustained on the basis of a claim of lien on real property under N.C.G.S. § 44A-23(b)(1) in an action in which plaintiff seeks to enforce a statutory lien against the property owner, contractor and contractor's surety for rental equipment furnished to a first tier subcontractor because an affidavit of the first tier subcontractor's president created a genuine issue of material fact as to the amount plaintiff is owed on its contract with the first tier subcontractor and thus the amount of its lien claim.

Chief Judge MARTIN concurring in part and dissenting in part.

Appeals by defendants Carmel Contractors, Inc., Lowe's Home Centers, Inc., and Western Surety Company from order and judgment entered 10 August 2006 by Judge Carl R. Fox in Wake County Superior Court. Heard in the Court of Appeals 20 August 2007.

Bugg & Wolf, P.A., by William J. Wolf and William R. Sparrow, for plaintiff-appellee.

Shumaker, Loop & Kendrick, LLP, by Steele B. Windle, III, and Daniel R. Hansen, for defendants-appellants.

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TYSON, Judge.

Carmel Contractors, Inc. (“Carmel”) and Lowe’s Home Centers, Inc. (“Lowe’s”) (collectively, “defendants”) appeal from order and judgment entered granting Park East Sales, LLC’s (“plaintiff”) motion for summary judgment and denying their motion to stay or dismiss. Western Surety Company (“Western”) also appeals from the order and judgment entered granting plaintiff’s motion for summary judgment and denying its motion for judgment on the pleadings. We dismiss in part, reverse in part, and remand.

I. Background

On 8 March 2004, Lowe’s entered into a contract with Carmel to construct a Lowe’s Home Improvement Store (“project”) in Cary, North Carolina. On 10 March 2004, Carmel entered into a subcontract agreement with Clark-Langley, Inc. (“Clark”), as the grading and site work subcontractor.

In February 2004, Clark entered into a rental agreement with plaintiff. From 25 February 2004 through 28 January 2005, plaintiff provided rental equipment, labor, and materials to Clark for use on the project. Clark agreed to pay for the use and transportation of and maintenance and repairs on the equipment within thirty days of each invoice date. Clark also agreed to pay plaintiff interest on all overdue balances at the highest rate permitted by law.

By November 2004, Clark was delinquent on invoice payments to plaintiff. Plaintiff made repeated demands for payment. Defendant Della Clark Edwards (“Edwards”), the president of Clark, guaranteed in writing that she would pay plaintiff for all obligations Clark incurred thereafter.

On 18 January 2005, plaintiff served a notice of claim of lien for \$392,581.48, plus interest and attorney’s fees, to Lowe’s, Carmel, and Clark. Lowe’s made three further payments to Carmel on 21 January 2005, 28 February 2005, and 25 March 2005, totaling \$1,629,911.00. On 25 May 2005, plaintiff filed a notice of claim of lien for \$441,170.77 plus interest and attorney’s fees with the Wake County Clerk of Superior Court. Lowe’s retained \$1,011,771.00, an amount sufficient to satisfy plaintiff’s lien claims. Carmel responded that no unpaid contract balance was owed to Clark at that time because of costs it had incurred and paid to complete Clark’s contractual obligations.

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Plaintiff filed its initial complaint on 16 June 2005 to enforce its lien rights against Clark, Edwards, Carmel, and Lowe's. Plaintiff amended its complaint on 18 August 2005, to add Western as a party, after receiving notice that Carmel had obtained a lien-discharge bond from Western as surety for plaintiff's claim of lien on the project property.

On 6 October 2005, a default judgment was entered against Clark and Edwards for failure to file a responsive pleading. Clark filed bankruptcy in the U.S. Bankruptcy Court on 14 October 2005 and instituted an adversary proceeding to determine the amount of money, if any, owed by Carmel. Carmel counterclaimed and moved to compel all of Clark's sixteen subcontractors, including plaintiff, to litigate their claims in bankruptcy court.

On 8 June 2006, plaintiff filed a motion for summary judgment against defendants and Western. Defendants requested the trial court stay further proceedings pending final disposition in the bankruptcy action to avoid "substantial injustice." Defendants also asserted plaintiff must obtain a judicial determination of the amount owed by Clark before pursuing its mechanic's lien claim.

Western moved for judgment on the pleadings, asserting plaintiff's claim was not ripe until a final judgment on plaintiff's lien claims has been rendered in bankruptcy court. Western described plaintiff's assertion to add it as a party in the State court action as "premature and unwarranted."

On 10 August 2006, the trial court granted plaintiff's motion for summary judgment. The trial court entered an order and judgment finding Lowe's to be liable for \$392,581.48, plus prejudgment interest, and finding Carmel and Western to be jointly and severally liable for \$441,170.70 plus prejudgment interest. The trial court also denied the motion to stay or to dismiss made by Lowe's and Carmel and denied the motion for judgment on the pleadings made by Western. Defendants appeal.

II. Issues

Defendants argue the trial court erred by: (1) denying their motion to stay or alternatively to dismiss the lawsuit due to the pending bankruptcy action and (2) granting plaintiff's motion for summary judgment. Western argues the trial court erred by denying its motion for judgment on the pleadings.

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III. Standard of Review**A. Motion to Stay**

The trial court may enter a stay “[i]f, in any action pending in any court of this State, the judge shall find that it would work substantial injustice for the action to be tried in a court of this State.” N.C. Gen. Stat. § 1-75.12 (2005). This court has held the denial of a motion to stay or dismiss rests “within the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of that discretion.” *Home Indem. Co. v. Hoechst-Celanese Corp.*, 99 N.C. App. 322, 325, 393 S.E.2d 118, 120 (citing *Motor Inn Management, Inc. v. Irvin-Fuller Dev. Co.*, 46 N.C. App. 707, 711, 266 S.E.2d 368, 370, *disc. rev. denied and appeal dismissed*, 301 N.C. 93, 273 S.E.2d 299 (1980)), *disc. rev. denied and appeal dismissed*, 327 N.C. 428, 396 S.E.2d 611 (1990).

B. Summary Judgment

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). The trial court must consider the evidence in the light most favorable to the non-moving party. *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003). If a genuine issue of material fact exists, a motion for summary judgment should be denied. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 471, 597 S.E.2d 674, 694 (2004). “If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal.” *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989). “On appeal, an order allowing summary judgment is reviewed *de novo*.” *Howerton*, 358 N.C. at 470, 597 S.E.2d at 693 (citing *Summey*, 357 N.C. at 496, 586 S.E.2d at 249).

IV. Defendants’ Appeal**A. Motion to Stay or Dismiss**

[1] Defendants argue the trial court abused its discretion in denying Carmel’s motion to stay, or alternatively to dismiss plaintiff’s state court action under N.C. Gen. Stat. § 1-75.12. We dismiss this assignment of error.

N.C. Gen. Stat. § 1-75.12(c) (2005) provides, “[w]henever a motion for a stay is made pursuant to subsection (a) . . . is denied, the movant

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may seek review by means of a writ of certiorari and *failure to do so shall constitute a waiver of any error* the judge may have committed in denying the motion.” (Emphasis supplied). Defendants assert both in their brief and at oral argument, “[s]ince a notice of appeal was filed, seeking a writ of *certiorari* would be duplicative, unnecessary and not required by Rule 21 of the North Carolina Rules of Appellate Procedure.” We disagree.

Under N.C. Gen. Stat. § 1-75.12(c), *defendants have no right to appeal* from the trial court’s failure to grant their motion to stay the action because they failed to petition for a writ of *certiorari*. *Jaeger v. Applied Analytical Indus. Deutschland GMBH*, 159 N.C. App. 167, 173, 582 S.E.2d 640, 645 (2003); *see Saxon v. Smith*, 125 N.C. App. 163, 174, 479 S.E.2d 788, 795 (1997) (“Electing to treat defendants’ assignment of error directed to this issue as a petition for writ of *certiorari*, . . . we perceive no abuse of discretion in the denial of defendants’ motion.”). Defendants failed to petition this Court for a writ of *certiorari*. In our discretion, we decline *ex mero motu* to treat defendants’ assignment of error as a petition for writ of *certiorari* and dismiss this assignment of error.

The dissenting opinion asserts this Court should: (1) exercise its discretion to allow and treat defendants’ assignment of error as a petition for writ of *certiorari*, even though defendants failed to petition or argue to this Court in their brief or in oral argument for this remedy and (2) find the trial court’s ruling manifestly unsupported by reason, an abuse of discretion, and reverse and remand to the trial court with instructions to grant a stay until issues involving Clark are resolved in bankruptcy court.

Clark’s filing in bankruptcy court operated as an automatic stay preventing all collection efforts against it pursuant to 11 U.S.C. § 362 (2005). Plaintiff is not attempting to collect sums due from Clark. Plaintiff is enforcing its statutory lien claims against Lowe’s, Carmel, and Western and is asserting claims individually against Edwards. Determining these amounts are not an effort at collection against Clark.

Edwards, who is a personal guarantor of a portion of Clark’s debt to plaintiff, did not file for bankruptcy. Clark’s automatic stay does not apply to her or any of the other parties in this case. Edwards’s affidavit, as discussed below, creates a genuine issue of material fact of the sums, if any, owed to plaintiff. The trial court must determine the amount of plaintiff’s lien before judgment can be entered.

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To adopt the dissenting opinion's assertions would set a dangerous precedent. Reversing and remanding this case to the trial court with instructions to enter a total stay until the resolution of Clark's bankruptcy will compel a stay to be entered in any pending multi-party state action where only one party later files bankruptcy. While some of the issues in the federal bankruptcy may overlap with the issues in this state lien action, the issues in both actions are not identical. Setoffs, defenses, and preferential payment recaptures exist in the bankruptcy action that are not available to the other parties in this action. *See* 11 U.S.C. § 547 (2005); 11 U.S.C. § 553 (2005); 11 U.S.C. § 558 (2005).

B. Summary Judgment Motion

Defendants argue the trial court erred in granting plaintiff's summary judgment motion by failing to consider Edwards's affidavit and because genuine issues of material fact exist on whether plaintiff had a valid mechanic's lien. We agree.

The trial court's order and judgment entered 10 August 2006 states it "review[ed] the discovery responses of record, *affidavits*, briefs, and arguments of counsel." (Emphasis supplied). We presume the trial court reviewed Edwards's affidavit dated 31 July 2006 prior to entering its order and judgment. The trial court's order and judgment does not state which type of lien asserted entitled plaintiff to summary judgment. Because summary judgment should be affirmed on appeal if it can be sustained on any ground, we will determine whether summary judgment can be sustained based on a claim of lien on funds under N.C. Gen. Stat. § 44A-18(2) or a claim of lien on property under N.C. Gen. Stat. § 44A-23(b)(1).

1. Claim of Lien on Funds

[2] N.C. Gen. Stat. § 44A-18(2) (2003) provides:

A second tier subcontractor who furnished labor, materials, or rental equipment at the site of the improvement shall be entitled to a lien upon funds that are owed to the first tier subcontractor with whom the second tier subcontractor dealt and which arise out of the improvement on which the second tier subcontractor worked or furnished materials. A second tier subcontractor, to the extent of his lien provided in this subdivision, shall also be entitled to be subrogated to the lien of the first tier subcontractor with whom he dealt provided for in subdivision (1) of this section and shall be entitled to perfect it by notice to the extent of his claim.

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Our Supreme Court held second-tier subcontractors have no right to assert a claim of lien upon funds under N.C. Gen. Stat. § 44A-18 when no funds are owed to the first-tier subcontractor at or after the time the second-tier subcontractor files its claim of lien. *Electric Supply Co. v. Swain Elec. Co.*, 328 N.C. 651, 654, 403 S.E.2d 291, 293 (1991) (“Since nothing was owed to the First-tier Subcontractor at or after the time that the Second-tier Subcontractor filed its lien claim, it is undisputed that . . . the Second-tier Subcontractor has no lien rights upon funds under N.C. Gen. Stat. § 44A-18.”).

In their response to plaintiff’s first set of interrogatories, defendants asserted Carmel owed no money “to Clark because the remaining contract balance was depleted by costs incurred by Carmel in completing Clark’s contractual obligations due to [its] default.” If Carmel owes no money to Clark, plaintiff has no right to assert a claim of lien on funds under N.C. Gen. Stat. § 44A-18.

A genuine issue of material fact exists on whether an unpaid contract balance remains between Carmel and Clark. Summary judgment cannot be sustained based on a lien on funds. N.C. Gen. Stat. § 44A-18(2).

2. Claim of Lien on Real Property

[3] N.C. Gen. Stat. § 44A-23(b)(1) (2003) provides:

A second or third tier subcontractor, who gives notice as provided in this Article, may, to the extent of his claim, enforce the lien of the contractor created by Part 1 of Article 2 of the Chapter *except when*:

a. The contractor, within 30 days following the date the building permit is issued for the improvement of the real property involved, posts on the property in a visible location adjacent to the posted building permit and files in the office of the Clerk of Superior Court in each county wherein the real property to be improved is located, a completed and signed Notice of Contract form and the second or third tier subcontractor fails to serve upon the contractor a completed and signed notice of subcontract form by the same means of service as described in G.S. 44A-19(d); or

b. After the posting and filing of a signed Notice of Contract and the service of a signed Notice of Subcontract, the contractor serves upon the second or third tier subcontractor,

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within five days following each subsequent payment, by the same means of service as described in G.S. 44A-19(d), the written notice of payment setting forth the date of payment and the period for which payment is made as requested in the Notice of Subcontract form set forth herein.

(Emphasis supplied).

Our Supreme Court has held, “N.C.G.S. § 44A-23 provides first-, second-, and third-tier subcontractors a separate right of subrogation to the lien of the contractor who deals with the owner, distinct from the rights contained in N.C.G.S. § 44A-18.” *Electric Supply Co.*, 328 N.C. at 660, 403 S.E.2d at 297.

Therefore, even if the owner has specifically paid the contractor for the labor or materials supplied by the specific unpaid subcontractor who is claiming the lien, that subcontractor retains a right of subrogation, to the extent of his claim, to whatever lien rights the contractor otherwise has in the project.

Id. at 661, 403 S.E.2d at 297.

Plaintiff gave notice of claim of lien upon funds as provided in N.C. Gen. Stat. § 44A-12 on 25 May 2005. Carmel failed to avail itself of the protections afforded it as a general contractor under N.C. Gen. Stat. § 44A-23(b). It is undisputed that Lowe’s owes Carmel \$1,011,771.00 on its contract. Plaintiff has a right of subrogation to Carmel’s lien to the extent of its claim.

Edwards, in her affidavit dated 31 July 2006, states, *inter alia*:

9. From March, 2004 through January, 2005, [plaintiff] sent invoices to Clark for a total of \$232,838.11 in rental charges for leased equipment.
10. Clark paid [plaintiff] at least \$102,971.50 in rental charges for leased equipment.
11. Clark has no record of receiving 36 invoices from [plaintiff] that total \$180,991.48 of the amount [plaintiff] claims is allegedly owed by Clark.

Plaintiff argues Clark’s and Edwards’s failure to answer and respond to its claims and request for admissions, caused those admissions to be deemed admitted, and bars consideration of her affidavit. Edwards never admitted the full amount of plaintiff’s claims and her guaranty liability does not extend to the entire amount of plaintiff’s claims.

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Edwards's affidavit creates a genuine issue of material fact on the amount plaintiff is owed on its contract with Clark, and by extension, the amount of its lien claim.

Summary judgment cannot be sustained based on a claim of lien on property because a genuine issue of material fact exists on whether an unpaid contract balance remains between Clark and plaintiff.

Reviewing the discovery responses of record, affidavits, briefs, and arguments of counsel *de novo*, we find genuine issues of material fact exist. Summary judgment cannot be sustained on either statute. N.C. Gen. Stat. § 44A-18; N.C. Gen. Stat. § 44A-23. The trial court erred when it found no genuine issues of material fact exist and plaintiff is entitled to summary judgment as a matter of law. The trial court's order of summary judgment is reversed in part.

V. Western's Appeal

Western argues the trial court erred in entering summary judgment against it because plaintiff's claim against it was unripe and premature. Because we hold that genuine issues of material fact exist, the trial court also erred when it entered summary judgment against Western. That portion of the trial court's order and judgment is also reversed.

VI. Conclusion

Defendants' failure to petition this Court for a writ of *certiorari* to review the trial court's denial of Carmel's motion to stay or alternatively to dismiss plaintiff's state court action "constitute[d] a wavier of any error the judge may have committed in denying the motion." N.C. Gen. Stat. § 1-75.12(c); *Jaeger*, 159 N.C. App. at 173, 582 S.E.2d at 645. Defendants' assignment of error to the trial court's ruling on this issue is dismissed.

Viewed in the light most favorable to defendants, proffered evidence tends to show genuine issues of material fact exist regarding whether an unpaid contract balance remains between Carmel and Clark and whether an unpaid contract balance remains between Clark and plaintiff.

Under *de novo* review, we hold the trial court erred in granting summary judgment in plaintiff's favor. The trial court's order and judgment is reversed in part. This case is remanded for further proceedings.

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Dismissed in Part, Reversed in Part, and Remanded.

Judge McCULLOUGH concurs.

Chief Judge MARTIN concurs in part and dissents in part by separate opinion.

MARTIN, Chief Judge, concurring in part, dissenting in part.

I concur with the majority that the trial court erred by improperly granting summary judgment in favor of plaintiff. However, I would vote that this Court exercise its discretion to hear the issue of the denial of defendant Carmel's motion to stay or dismiss, and I would reverse the trial court's decision denying the stay. Thus, I must respectfully dissent from that portion of the majority opinion which dismisses defendants' assignment of error directed to the trial court's denial of their motion for a stay.

The majority correctly notes the governing statute, which states: "Whenever a motion for a stay . . . is denied, the movant may seek review by means of a writ of certiorari and failure to do so shall constitute a waiver of any error the judge may have committed in denying the motion." N.C. Gen. Stat. § 1-75.12(c) (2005). Although defendants have no right to appeal from the trial court's failure to grant their motion to stay the action, *Jaeger v. Applied Analytical Indus. Deutschland GMBH*, 159 N.C. App. 167, 173, 582 S.E.2d 640, 645 (2003), this Court has the discretion "to treat defendants' assignment of error . . . as a petition for writ of certiorari." *Saxon v. Smith*, 125 N.C. App. 163, 174, 479 S.E.2d 788, 795 (1997). This case is precisely the type of case in which this Court should exercise its discretion to review the denial of the motion to stay. In my view, for this Court to reverse the grant of summary judgment without also considering whether the motion to stay was properly denied, as the majority has done, is illogical and inconsistent because the trial court will now be required to hear the case in the absence of Clark, a necessary party whose rights and obligations are at the very center of the controversy. It thereby threatens to work substantial injustice to plaintiff, defendants, and Clark.

In reversing the grant of summary judgment, the majority correctly notes two genuine issues of material fact that should be submitted to the factfinder: "whether an unpaid contract balance remains between [defendant] Carmel and Clark and whether an unpaid con-

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tract balance remains between Clark and plaintiff.” Both of these issues clearly recognize that Clark is a necessary party to the proceedings. “Necessary parties are those persons who have rights which must be ascertained and settled before the rights of the parties to the suit can be determined.” *Equitable Life Assurance Soc’y v. Basnight*, 234 N.C. 347, 352, 67 S.E.2d 390, 395 (1951). Here, Clark has rights with respect to the amount it is owed by defendant Carmel and the amount it owes to plaintiff, and these rights must be determined before the suit between plaintiff and defendants can be resolved.

Although originally a party, Clark’s filing in bankruptcy court operated as an automatic stay preventing other proceedings against it pursuant to 11 U.S.C. § 362 (2005). Therefore, despite Clark’s joinder in the proceedings, in this case it was as if Clark had not been joined because the action could not proceed against Clark. This situation before us is directly analogous to a situation where a necessary party cannot be joined. Thus, in similar fashion, “[w]here . . . a fatal defect of the parties is disclosed, the court should refuse to deal with the merits of the case until the absent parties are brought into the action” *Booker v. Everhart*, 294 N.C. 146, 158, 240 S.E.2d 360, 367 (1978). Although the bankruptcy filing created a stay with respect only to Clark and none of the other parties to the action, Clark’s inability to litigate in a forum other than bankruptcy court affects the other parties whose claims depend on amounts owed to and owing from Clark. Accordingly, the trial court should have granted defendant Carmel’s motion to stay adjudication of the claim between plaintiff and defendants.

If there were no factual dispute as to the amounts owed between the parties, then Rule 19(b) would allow the trial court to decide the case in Clark’s absence, and a stay would be unnecessary. *See* N.C. Gen. Stat. § 1A-1, Rule 19(b) (2005). However, as the majority has thoroughly discussed, summary judgment was improperly granted because the amount owed by defendants to plaintiff raises genuine issues of material fact and depends on amounts owed to and owing from Clark. These circumstances make the denial of the stay unsupported.

A trial court’s denial of a motion to stay is subject to an abuse of discretion standard of review. *Home Indem. Co. v. Hoechst Celanese Corp.*, 128 N.C. App. 113, 117, 493 S.E.2d 806, 809 (1997). “We should reverse a trial court and find an abuse of discretion . . . ‘only upon a showing that its ruling could not have been the result of a reasoned decision.’” *State v. Campbell*, 177 N.C. App. 520, 530, 629 S.E.2d 345,

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351 (quoting *State v. Burrus*, 344 N.C. 79, 90, 472 S.E.2d 867, 875 (1996)), *disc. review denied*, 360 N.C. 578, 635 S.E.2d 902 (2006).

The trial court's authority to grant or deny the stay comes from N.C.G.S. § 1-75.12, which provides for the grant of a stay "[i]f . . . the judge shall find that it would work substantial injustice for the action to be tried in a court of this State." N.C. Gen. Stat. § 1-75.12(a) (2005). To determine whether a stay should be granted:

Relevant facts that may be considered include: the nature of the case, the applicable law, the convenience of witnesses, the availability of process to compel the attendance of witnesses, the ease of access to sources of proof, the burden of litigating matters of local concern in local courts, and other practical considerations which would make the trial easy, expeditious and inexpensive.

Home Indem. Co., 128 N.C. App. at 119, 493 S.E.2d at 810. Applying these guidelines to the present case, it is clear that (1) Clark is a necessary party that could not proceed in the action; (2) bankruptcy court was a more convenient forum because all parties had already been joined in that action; and (3) hearing the action in bankruptcy court would avoid duplication of litigation effort, time, and costs by consolidating all issues into one trial, resulting in one enforceable judgment.

Because there were genuine issues of material fact requiring Clark's inclusion in the proceeding, it was unreasonable and an abuse of discretion for the trial court to deny the stay. The majority's fear that such a holding would "set a dangerous precedent" is unfounded. The exercise of discretion requires only that the court weigh the unique facts before it on a case-by-case basis. *United Servs. Auto. Ass'n v. Simpson*, 126 N.C. App. 393, 400, 485 S.E.2d 337, 341, *disc. review denied*, 347 N.C. 141, 492 S.E.2d 37 (1997). In this case, for the reasons stated, a stay should be granted, but such a holding here would not, as the majority asserts, "compel a stay to be entered in any pending multi-party state action where only one party later files bankruptcy."

Therefore, I would vote to reverse and remand the case to the trial court with instructions to grant the stay until the issues involving Clark are resolved in bankruptcy court, which will necessarily resolve the issues of fact noted by the majority, or until the bankruptcy stay is dissolved otherwise so that this action may proceed with Clark as a necessary party.

IN RE A.R.H.B. & C.C.H.L.

[186 N.C. App. 211 (2007)]

IN THE MATTER OF: A.R.H.B. AND C.C.H.L.

No. COA07-690

(Filed 2 October 2007)

1. Termination of Parental Rights— notice—findings—reasoned decision

The termination of a father's parental rights was affirmed. Although respondent appealed the termination based on lack of notice and assigned error to most of the findings, he did not cite any particular assignments of error in his brief. Those assignments of error are abandoned, the findings are conclusive, and the extent of the findings indicate a reasoned decision.

2. Termination of Parental Rights— late written order—oral rendition presumed correct

A mother whose parental rights were terminated was not prejudiced by the trial court's pattern of entering orders late, which she contended inhibited her efforts to complete her case plan. There was no transcript of the hearing, and it is presumed that the court's oral rendition of its order stated everything found in the subsequent written order.

3. Termination of Parental Rights— family reunification efforts—housing and transportation

The trial court did not violate the Federal Adoption and Safe Families Act in the provision of services for the reunification of the family where respondent contended that she was unable to overcome her poverty to meet the goals set by DSS, specifically in transportation and housing. DSS provided foster care services, and nowhere is it stated that DSS must provide housing aid and permanent transportation. In fact, case law appears to reach the opposite conclusion.

4. Termination of Parental Rights— wilfully leaving children in foster care—findings and conclusions

The trial court properly exercised its discretion in terminating respondent mother's parental rights upon findings and conclusions that respondent had willfully left her children in foster care without making reasonable progress to correct the conditions which led to their placement.

IN RE A.R.H.B. & C.C.H.L.

[186 N.C. App. 211 (2007)]

Appeal by respondent father and respondent mother from orders entered 22 February and 21 March 2007 by Judge Angela Puckett in Stokes County District Court. Heard in the Court of Appeals 4 September 2007.

J. Tyrone Browder, for Stokes County Department of Social Services, petitioner-appellee.

Pamela N. Williams, for Guardian ad Litem.

Charlotte Gail Blake, for respondent-appellant father.

Richard E. Jester, for respondent-appellant mother.

JACKSON, Judge.

Respondent father, M.B., appeals from an order terminating his parental rights to the minor child A.R.H.B. Respondent mother, S.L.H., appeals from an order terminating her parental rights to both minor children, A.R.H.B. and C.C.H.L. The father of minor child C.C.H.L. has not appealed the termination of his parental rights.

The Stokes County Department of Social Services (“DSS”) obtained non-secure custody of the minor children 16 March 2005, after filing a petition alleging that they were dependent and neglected juveniles as defined by North Carolina General Statutes, section 7B-101(9) and (15). DSS had been called to the children’s residence where they were found in the care of their maternal grandmother. The grandmother and her boyfriend were intoxicated and were suspected of engaging in domestic violence in the home. There were also allegations that C.C.H.L., fourteen, had been allowed to have sex with her boyfriend, eighteen, who also lived in the house. Respondent mother had moved to Florida and left the children in her mother’s care while she sought to establish a home there. The whereabouts of both fathers were unknown.

After returning to North Carolina, respondent mother entered into a reunification plan on 7 July 2005 as to both children. Under these plans, she was required to (1) submit to a substance abuse assessment and follow all recommendations; (2) submit to random drug testing; (3) make an appropriate plan for the children should she choose to drink to the point of intoxication; (4) complete parenting classes and demonstrate an ability to appropriately parent and supervise the children and follow recommendations; (5) meet with a social worker one time per month and call one time per month to

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report any progress; (6) pay an appropriate amount of child support for the children; (7) obtain and maintain employment to be able to provide for the children's basic needs; and (8) obtain and maintain a safe and stable home.

On 2 August 2005, the trial court adjudicated the children neglected and dependent. The disposition order was not entered until 21 December 2005.

Respondent father eventually was located at Kershaw Correctional Institution in Kershaw, South Carolina, where he was sent notice of a permanency planning hearing concerning A.R.H.B. scheduled for 14 March 2006. Respondent father subsequently was transferred to another facility, where he actually received the notice in late February or early March 2006. In response, he mailed a letter on 6 March 2006 to the presiding judge in which he stated that he was due to be released 1 May 2006 and questioned his paternity. He sought a continuance so that he could attend the hearing, hire an attorney, and determine paternity. The 14 March 2006 hearing was held as scheduled in respondent father's absence, with the court concluding that the filing of a termination petition or motion in the cause was not in the children's best interest because respondent mother was still determined to address substance abuse through treatment. The order was not signed until 27 June 2006.

After the 14 March 2006 hearing, but before the order was signed, DSS filed motions for termination of parental rights as to both children on 17 April 2006. Respondent father was served with notice of the termination hearing pursuant to North Carolina General Statutes, section 7B-1106.1 on 21 April 2006. Such notice stated that the date, time, and place of hearing would be mailed thirty days from the date of service of said notice if no response was filed. Respondent father filed no response. A guardian *ad litem* for the termination was appointed for respondent father "or any/all unknown father" on 21 September 2006. The termination hearing was continued several times, but eventually scheduled for 22 February 2007. Notice of calendaring was served on respondent father's guardian *ad litem* on 2 February 2007.

Paternity testing was initiated by DSS in late 2006. Respondent father was determined to be A.R.H.B.'s biological father on 12 February 2007. The guardian *ad litem* moved the court to continue the case to allow respondent father to be in attendance and prepare an answer, because of the recent determination that he was the

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child's father. The court denied the motion because respondent father had been served with notice of the termination hearing, received a copy of the motion for termination, and had never filed an answer or other responsive pleading at any time prior to the hearing. At the time of the termination hearing, respondent father was again incarcerated in South Carolina.

The court found that sufficient grounds existed to terminate the parental rights of respondent father in that he had not, prior to the filing of the motion, (1) established paternity judicially or by affidavit filed in a central registry; (2) legitimated A.R.H.B. pursuant to North Carolina General Statutes, section 49-10 or filed a petition for this purpose; (3) legitimated A.R.H.B. by marrying [respondent] mother; or (4) provided substantial financial support or consistent care to A.R.H.B. and her mother.

The court found that sufficient grounds existed to terminate the parental rights of respondent mother in that: (1) she had neglected the children within the meaning of North Carolina General Statutes, sections 7B-1111(a)(1) and 7B-101; (2) she had willfully left the children in foster care for more than twelve months without showing reasonable progress; and (3) she was incapable of providing for the proper care and supervision of the children, and there was a reasonable probability that such incapability will continue for the foreseeable future.

A dispositional hearing was held 21 March 2007, at which time the court concluded it was in the best interest of both minor children that parental rights be terminated.

Respondent Father

[1] Respondent father appeals the termination of his parental rights solely on the basis of lack of notice. We find his argument to be without merit.

Parental rights are terminated in a two-step process: adjudication of grounds for termination, and disposition. *In re Nesbitt*, 147 N.C. App. 349, 351, 555 S.E.2d 659, 661 (2001). In the adjudicatory phase, this Court determines whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence, and whether these findings support its conclusions of law. *Id.* "If unchallenged on appeal, findings of fact 'are deemed supported by competent evidence' and are binding upon this Court." *In re J.M.W., E.S.J.W.*, 179 N.C. App. 788, 792, 635 S.E.2d 916, 919 (2006) (quoting *In re Padgett*, 156 N.C. App. 644, 648, 577 S.E.2d 337, 340 (2003)).

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Here, the trial court made the following findings of fact, which respondent father has not challenged and, therefore, are binding upon this Court:

2. The Motion to Terminate Parental Rights was filed on April 17, 2006.

....

4. [Respondent father] was personally served with Notice in Proceeding for Termination of Parental Rights and a copy of the Motion for Termination of Parental Rights by certified mail on April 21, 2006.

5. [Respondent father] did not file an Answer or other responsive pleading to the Motion for Termination of Parental Rights

....

8. Attorney Don George was appointed as Guardian ad Litem for any and all unknown fathers of the juvenile on September 21, 2006.

....

14. Don George, Guardian ad Litem for the unknown father, made a motion in open court requesting that the Court either dismiss the case with respect to the respondent father or continue the case to allow the respondent father to be in attendance or to prepare an answer in the case, based on the fact that the respondent had just been determined to be the father approximately one week prior to the adjudication hearing. Said motion to dismiss was also renewed at the close of the evidence. The Court denied both motions based on the fact that the respondent father was duly served with Notice in Proceeding for Termination of Parental Rights and a copy of the Motion for Termination of Parental Rights, and failed to file an answer or other responsive pleading at any time prior to the adjudication hearing.

....

39. [Respondent] father of the juvenile knew that [respondent] mother was pregnant with his child however he was in prison on the date of the birth of the juvenile. After the birth of the juvenile [respondent] father visited with [respondent] mother and juvenile on one occasion but has never provided any support for the juvenile.

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40. [Respondent] father was in prison on the date the Motion to Terminate Parental Rights was filed; however he was released shortly thereafter and was not incarcerated for a period of approximately four months. During said period that [respondent] father was not incarcerated he made no contact with [respondent] mother, the juvenile or [DSS]. He also made no request for paternity testing during said period.

41. [Respondent] father is currently incarcerated in South Carolina. During the latter part of 2006 [DSS] initiated paternity testing for the purpose of confirming that [respondent father] was the father of the juvenile. Test results were received in mid-February 2007 confirming that [respondent father] is the biological father of the juvenile.

42. [Respondent] father of the juvenile has not (i) established paternity judicially or by affidavit which has been filed in a central registry maintained by the Department of Health and Human Services; or (ii) legitimated the juvenile pursuant to the provisions of G.S. 49-10 or filed a petition for this specific purpose; or (iii) legitimated the juvenile by marriage to [respondent] mother of the juvenile; or (iv) provided substantial financial support or consistent care with respect to the juvenile and mother.

....

49. [Respondent] father of the juvenile who was born out of wedlock, has not, prior to the filing of the motion to terminate parental rights: [items (i) through (iv) of finding of fact number 42] all within the meaning of G.S. [7B-]1111(a)(5) based on Findings of Fact number[s] 39 through 41.

Although respondent father assigned error to most of these findings in the record, he has not cited to any of those particular assignments of error in his brief.

Immediately following each question [presented in the brief] shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal. Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.

N.C. R. App. P. 28(b)(6) (2006). Those assignments of error, therefore, are abandoned and the findings of fact are conclusive on appeal.

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Based upon the foregoing findings of fact, the trial court concluded as a matter of law that sufficient grounds existed to terminate respondent father's parental rights, listing the same reasons stated in finding of fact number 49. North Carolina General Statutes, section 7B-1111 sets out the grounds for terminating parental rights. Under that section, parental rights may be terminated upon a finding that:

The father of a juvenile born out of wedlock has not, *prior to the filing of a petition or motion to terminate parental rights*:

- a. Established paternity judicially or by affidavit which has been filed in a central registry maintained by the Department of Health and Human Services; provided, the court shall inquire of the Department of Health and Human Services as to whether such an affidavit has been so filed and shall incorporate into the case record the Department's certified reply; or
- b. Legitimated the juvenile pursuant to provisions of G.S. 49-10 or filed a petition for this specific purpose; or
- c. Legitimated the juvenile by marriage to the mother of the juvenile; or
- d. Provided substantial financial support or consistent care with respect to the juvenile and mother.

N.C. Gen. Stat. § 7B-1111(a)(5) (2005) (emphasis added).

As with findings of fact, "[t]he appellant must assign error to each conclusion it believes is not supported by the evidence. Failure to do so constitutes an acceptance of the conclusion and a waiver of the right to challenge said conclusion as unsupported by the facts." *Fran's Pecans, Inc. v. Greene*, 134 N.C. App. 110, 112, 516 S.E.2d 647, 649 (1999) (internal citations omitted). Respondent father failed to cite in his brief an assignment of error challenging the trial court's conclusion that grounds exist to terminate his parental rights.

Moreover, the trial court's findings support its conclusion that prior to 17 April 2006, the date the Motion to Terminate Parental Rights was filed, respondent father had not established paternity, legitimated the child by statute or marriage, nor had he provided substantial financial support. Paternity was established *by DSS* shortly before the hearing—nearly ten months after the motion was filed. The child never was legitimated by respondent father and he visited the child only once and never provided any support.

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After finding that grounds for termination exist, the trial court moves to the disposition phase. *In re Nesbitt*, 147 N.C. App. at 352, 555 S.E.2d at 662. Having found grounds for termination, the trial court does not automatically terminate parental rights. *Id.* If the trial court finds that it would be in the child's best interest, it has discretion to terminate parental rights. *Id.* This decision is reviewed by this Court on an abuse of discretion standard. *Id.* The decision to terminate parental rights will not be overturned on appeal absent a showing that the decision was manifestly unsupported by reason. *In re J.A.A.*, 175 N.C. App. 66, 75, 623 S.E.2d 45, 51 (2005).

The extent of the trial court's findings evidences a reasoned decision; therefore, we affirm the termination of respondent father's parental rights to A.R.H.B.

Respondent Mother

[2] Respondent mother first argues that the trial court's pattern of entering orders late prejudiced her in her efforts to complete her case plan, thereby invalidating the order terminating her parental rights. We disagree.

Although adjudicatory and dispositional orders, as well as review and permanency planning orders, are statutorily required to be filed within thirty days of the hearing pursuant to North Carolina General Statutes, sections 7B-807(b), -905(a), -906(d), and -907(c), "our appellate courts have uniformly applied a 'prejudicial error' analysis to determine whether the subject order must be reversed." *In re P.L.P.*, 173 N.C. App. 1, 7, 618 S.E.2d 241, 245 (2005).

Respondent mother argues that the trial court's failure to enter its disposition order of 2 August 2005 until 21 December 2005 prejudiced her ability to comply with it. She cites *In re B.P., S.P., R.T.*, 169 N.C. App. 728, 612 S.E.2d 328 (2005), in support of her argument. *B.P.* is distinguishable. In *B.P.*, the order in question changed the permanent plan for the child. This Court found prejudice not only because the order was filed six months after the hearing, but also because the oral rendition failed to state certain important items. In the six months between the hearing and entry of the order, the mother was not provided "the necessary information from which she could prepare for future proceedings. She had no notice of the particular findings of fact or conclusions of law upon which the trial court based its decision." *Id.* at 736, 612 S.E.2d at 333.

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We have no transcript of the 2 August 2005 hearing. “The long-standing rule is that there is a presumption in favor of regularity and correctness in proceedings in the trial court, with the burden on the appellant to show error.” *L. Harvey & Son Co. v. Jarman*, 76 N.C. App. 191, 195-96, 333 S.E.2d 47, 50 (1985). Unless the record reveals otherwise, we presume “that judicial acts and duties have been duly and regularly performed.” *Lovett v. Stone*, 239 N.C. 206, 212, 79 S.E.2d 479, 483 (1954). We therefore presume that the trial court’s oral rendition of its order in the case *sub judice* stated everything found in the written order. With respect to respondent mother’s obligations under this order, she was ordered (1) to visit her children in DSS’s discretion, (2) to comply with her existing care plan, and (3) to pay child support. During the delay between the hearing and entry of the order, respondent mother (1) visited with her children, (2) worked on her case plan, and (3) could have paid child support. In addition, she was present for the review hearings held 27 October and 16 November 2005. Based upon the foregoing, we hold that there was no prejudice to respondent mother.

[3] Respondent mother next argues that the trial court violated the Federal Adoption and Safe Families Act because DSS provided no meaningful services to aid in the reunification of the family. We disagree.

The Federal Adoption and Safe Families Act (“ASFA”) states:

The State must make reasonable efforts to maintain the family unit and prevent the unnecessary removal of a child from his/her home, as long as the child’s safety is assured. . . . In determining reasonable efforts to be made with respect to a child and in making such reasonable efforts, the child’s health and safety must be the State’s paramount concern.

45 C.F.R. 1356.21(b) (2005). Furthermore, ASFA maintains, “[t]he judicial determinations regarding . . . reasonable efforts to prevent removal . . . must be explicitly documented and must be made on a case-by-case basis and so stated in the court order.” 45 C.F.R. 1356.21(d) (2005). Respondent mother argues that because no meaningful services were provided, she was unable to overcome her poverty to meet the goals set forth by DSS. However, she readily concedes that there were services rendered by DSS to aid in the transition and possible reunification of respondent mother and her children: (1) foster care services; (2) transportation services; (3) medicaid; (4) SCAN for parenting classes; and (5) TASC and WISH for

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substance abuse treatment. Although aid was given, respondent mother contends that DSS did not provide adequate transportation and housing aid and, therefore, did not provide a “reasonable effort” to reunify the family unit.

“Reasonable efforts” are defined by statute as: “The diligent use of preventive or reunification services by a department of social services when a juvenile’s remaining at home or returning home is consistent with achieving a safe, permanent home for the juvenile within a reasonable period of time.” N.C. Gen. Stat. § 7B-101(18) (2005). In the instant case, DSS provided foster care services, medic-aid, parenting classes, and procured substance abuse treatment. Nowhere is it stated that DSS must provide housing aid and permanent transportation. In fact, the case law appears to reach the opposite conclusion; that having to provide such fundamental necessities is evidence of instability, therefore, presenting safety and health concerns for the respondent’s children. *See In re Brim*, 139 N.C. App. 733, 742-43, 535 S.E.2d 367, 372-73 (2000); *see also In re Nolen*, 117 N.C. App. 693, 696-700, 453 S.E.2d 220, 222-25 (1995).

Accordingly, we hold the efforts made by DSS reasonable and in compliance with ASFA.

[4] In her final argument, respondent mother challenges several of the trial court’s findings of fact and conclusions of law as unsupported by the evidence. A termination order will be upheld on appeal so long as one of the grounds for termination found by the trial court is supported by clear, cogent and convincing evidence. *See In re Bradshaw*, 160 N.C. App. 677, 682-83, 587 S.E.2d 83, 87 (2003). In the case *sub judice*, the trial court found three separate grounds existed to terminate parental rights.

Parental rights may be terminated if the “parent has willfully left the juvenile in foster care . . . for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile.” N.C. Gen. Stat. § 7B-1111(a)(2) (2005). Before terminating rights on this ground, the court must determine two things: (1) whether the parent willfully left the child in foster care for more than twelve months, and if so, (2) whether the parent has not made reasonable progress in correcting the conditions that led to the removal of the child from the home. *In re O.C.*, 171 N.C. App. 457, 464-65, 615 S.E.2d 391, 396, *disc. rev. denied*, 360 N.C. 64, 623 S.E.2d 587 (2005).

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“A finding of willfulness does not require a showing of fault by the parent.” *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 398 (1996). Voluntarily leaving a child in foster care for more than twelve months or a failure to be responsive to the efforts of DSS are sufficient grounds to find willfulness. *Id.* at 440, 473 S.E.2d at 398. Similarly, a parent’s prolonged inability to improve his or her situation, notwithstanding some efforts and good intentions, will support a conclusion of lack of reasonable progress. *In re B.S.D.S.*, 163 N.C. App. 540, 546, 594 S.E.2d 89, 93 (2004).

Finding of Fact 17/16,¹ which is unchallenged and therefore binding on this Court, states that A.R.H.B. and C.C.H.L. were taken into DSS custody on 16 March 2005. Finding of Fact 1/1, also unchallenged, states that the juveniles remained in DSS custody on the date of hearing, 22 February 2007. This satisfies the twelve-month requirement in North Carolina General Statutes, section 7B-1111(a)(2).

As to whether respondent mother made reasonable progress, the trial court found:

20/19. On July 7, 2005 [respondent] mother signed a Family Services Agreement with [DSS] under the terms of which [respondent] mother agreed to [*inter alia*] obtain a substance abuse assessment and follow all recommendations; . . . complete parenting classes . . . ; obtain and maintain employment . . . ; obtain and maintain a safe and stable home; [and] meet with social worker monthly

. . . .

22/21. From July 6, 2006 through November 16, 2006 [respondent] mother missed seven out of eleven appointments . . . and failed to complete the [substance abuse] treatment program. [Respondent] mother was finally discharged from the treatment program November 29, 2006 for noncompliance with TASC program requirements and treatment recommendations.

. . . .

24/23. During the period from August 2, 2005 through October 3, 2006 [respondent] mother was requested to take thirteen drug

1. Separate orders were entered for each of the minor children. Findings of Fact and Conclusions of Law are cited with the number in A.R.H.B.’s order, followed by the corresponding number in C.C.H.L.’s order.

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tests. She refused two tests, tested negative on six tests, tested positive for marijuana on four tests, and one test was dilute.

25/24. [Respondent] mother attended parenting classes from August, 2005 through October 17, 2005 but never successfully completed the classes due to missing five out of ten classes. . . .

. . . .

27/26. Since April 2005 through the date of this hearing [respondent] mother has failed to establish a residence of her own, but has lived with friends and relatives in at least eight different locations. On July 12, 2006 [respondent] mother was living out of a car in a friend's driveway. [Respondent] mother is currently living with a male friend.

28/27. During the past two years [respondent] mother has failed to establish and maintain any permanent and stable employment. . . .

. . . .

34/33. [Respondent] mother has failed to stay in contact with [DSS] on a monthly basis. The only recent contact that [DSS] has had with [respondent] mother has been at scheduled court hearings at which she appeared.

Though all of these findings were challenged on appeal, there is clear, cogent, and convincing evidence in the record to support each of them. These findings all go to support the court's conclusion that respondent mother had willfully left her children in foster care without making reasonable progress to correct the conditions which led to their placement. The trial court properly exercised its discretion in terminating respondent mother's parental rights upon these findings and conclusions.

We conclude that the court's findings of fact were supported by clear, cogent, and convincing evidence in the record and that these findings supported the court's conclusions of law as to both respondent parents. Based upon the trial court's conclusion that grounds existed to terminate the parental rights of both parents, it was in the court's discretion to terminate parental rights in the best interest of the children. We hold that there was no abuse of that discretion.

Affirmed.

Judges STEELMAN and STROUD concur.

IN RE APPEAL OF IBM CREDIT CORP.

[186 N.C. App. 223 (2007)]

IN THE MATTER OF: APPEAL OF IBM CREDIT CORPORATION FROM THE DECISION OF
THE DURHAM COUNTY BOARD OF COUNTY COMMISSIONERS CONCERNING THE VALUATION
AND TAXATION OF PERSONAL PROPERTY FOR TAX YEAR 2001

No. COA06-1002

(Filed 2 October 2007)

**Taxation— business personal property tax—leased computer
equipment—valuation—burden of proof**

The Property Tax Commission erred by upholding a county's valuation of 40,779 pieces of leased computer equipment for business personal property taxes in tax year 2001 based on an improper application of the burden of proof framework mandated by our Supreme Court, and the case is remanded so that the Commission may reconsider the evidence in light of the proper burdens of production and persuasion, because: (1) *Southern Railway*, 313 N.C. 177 (1985), clarifies that the burden upon the aggrieved taxpayer is one of production and not persuasion; (2) the Commission imposed a burden of persuasion on IBM Credit rather than a burden of production; (3) although the Commission required in a conclusion of law that IBM Credit produce evidence to show that the county's valuation method was arbitrary and capricious, *AMP*, 287 N.C. 547 (1975), only required the production of evidence that tends to show that the method was arbitrary and capricious; (4) given three improper articulations placing a burden of proof on IBM Credit, it cannot be determined that the Commission applied the proper burden-shifting framework; and (5) it cannot be determined with certainty whether the Commission's misunderstanding of the relevant burdens affected its findings and conclusions.

Judge TYSON dissenting.

Appeal by taxpayer from final decision entered 30 March 2006 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 7 March 2007.

*Manning Fulton & Skinner P.A., by Michael T. Medford and
Judson A. Welborn, for taxpayer-appellant.*

Durham County Attorney S. C. Kitchen for respondent-appellee.

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GEER, Judge.

IBM Credit Corporation appeals from a final decision of the Property Tax Commission upholding Durham County's valuation of 40,779 pieces of leased computer equipment for business personal property taxes in tax year 2001. IBM Credit contends that the County's valuation exceeds the equipment's "true value in money" in violation of N.C. Gen. Stat. § 105-283 (2005). IBM Credit also argues, however, that the Commission did not properly apply the burden of proof framework mandated by our Supreme Court. Because we agree with this latter contention, we do not address IBM Credit's arguments regarding § 105-283, but instead remand this matter so that the Commission may reconsider the evidence in light of the proper burdens of production and persuasion.

Facts

The leased equipment at issue in this case falls into four categories: mainframe computers, mid-range computers, personal computers, and peripheral equipment such as printers and storage devices. Generally, the leasing process was structured so that the IBM Credit customer would negotiate an acquisition price for a particular item with a vendor. IBM Credit would then purchase the item at the price negotiated between the customer and the vendor. After acquiring the equipment, IBM Credit would in turn lease it to the customer, typically for a period of three years, in exchange for monthly payments. IBM Credit would retain whatever residual value the equipment retained at the end of the lease term.

To assess the value of the 40,779 pieces of computer equipment, Durham County used Schedule U5 of the 2001 Cost Index and Depreciation Schedules published by the North Carolina Department of Revenue. The Department of Revenue developed Schedule U5 to assist county tax assessors in determining the value of used computers and computer-related equipment. Based on the depreciation tables of Schedule U5, Durham County determined the value of IBM Credit's equipment to be \$144,277,140.00.

On 25 January 2002, IBM Credit sought a hearing before the Property Tax Commission to challenge Durham County's valuation. In its application, IBM Credit contended that the value of its equipment was only \$96,458,707.00. On 30 March 2006, following an evidentiary hearing, the Commission entered its final decision, rejecting IBM Credit's valuation of \$96,458,707.00 and upholding Durham County's

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valuation of \$144,277,140.00. IBM Credit gave timely notice of appeal to this Court.

Discussion

On appeal, IBM Credit strenuously argues that Durham County's reliance on the state-promulgated Schedule U5 violates N.C. Gen. Stat. § 105-283, which requires that "[a]ll property, real and personal, shall as far as practicable be appraised or valued at its true value in money." The statute further provides:

When used in this Subchapter, the words "true value" shall be interpreted as meaning *market value*, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used.

N.C. Gen. Stat. § 105-283 (emphasis added). IBM Credit contends that use of Schedule U5 is unlawful in this instance, because it is not based on transactional information from the marketplace and thus does not lead to a determination of actual "market value," as required by § 105-283.

IBM Credit also argues, however, that the Commission's decision includes a "mistaken conclusion of law that the burden of proof rested solely on IBM Credit." We address this issue first since, if the Commission did err with respect to the burden of proof, then its findings of fact could be affected by the misapprehension of the law. *See N.C. Dep't of Justice v. Eaker*, 90 N.C. App. 30, 36-37, 367 S.E.2d 392, 397 (remanding when State Personnel Commission made its findings under a misapprehension of law regarding proper burden of proof), *disc. review denied*, 322 N.C. 836, 371 S.E.2d 279 (1988), *overruled on other grounds by Batten v. N.C. Dep't of Corr.*, 326 N.C. 338, 389 S.E.2d 35 (1990).

In *In re Appeal of AMP, Inc.*, 287 N.C. 547, 562, 215 S.E.2d 752, 761 (1975), our Supreme Court held that it is "a sound and a fundamental principle of law in this State that ad valorem tax assessments are presumed to be correct." A taxpayer may rebut this presumption by "produc[ing] competent, material and substantial evidence that tends to show that: (1) Either the county tax supervisor used an arbitrary method of valuation; or (2) the county tax supervisor used an illegal method of valuation; AND (3) the assessment substantially

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exceeded the true value in money of the property.” *Id.* at 563, 215 S.E.2d at 762 (emphasis omitted) (internal quotation marks omitted).

In *In re Appeal of S. Ry. Co.*, 313 N.C. 177, 328 S.E.2d 235 (1985), the Supreme Court explained further that once a taxpayer produces the evidence required by *AMP*, the burden of proof then shifts to the taxing authority: “The burden of going forward with evidence and of persuasion that its methods would in fact produce true values then rest[s] with the [taxing authority].” *Id.* at 182, 328 S.E.2d at 239. *Southern Railway* involved a challenge by two railroad companies to the Department of Revenue’s appraisal of the companies’ market value. *Id.* at 178-79, 328 S.E.2d at 237. According to the Supreme Court:

When the Railroads offered evidence that the appraisal methods used by the Department would not produce true values for the Railroads and that the values actually produced by these methods were substantially in excess of true value, they rebutted the presumption of correctness. The burden of going forward with evidence and of persuasion that its methods would in fact produce true values then rested with the Department. And it became the Commission’s duty to hear the evidence of both sides, to determine its weight and sufficiency and the credibility of witnesses, to draw inferences, and to appraise conflicting and circumstantial evidence, all in order to determine whether the Department met its burden.

Id. at 182, 328 S.E.2d at 239.

Southern Railway thus clarifies that the burden upon the aggrieved taxpayer, set forth in *AMP*, is one of production and not persuasion: the taxpayer must offer evidence that the government’s appraisal relies on illegal or arbitrary valuation methods. Other decisions of the North Carolina appellate courts are consistent on this point. See *In re Appeal of the Greens of Pine Glen Ltd. P’ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (“a taxpayer may rebut th[e] [*AMP*] presumption if it *produces* ‘competent, material and substantial’ evidence . . .” (emphasis added)); *In re Appeal of Murray*, 179 N.C. App. 780, 783, 635 S.E.2d 477, 479 (2006) (“To rebut th[e] [*AMP*] presumption, the taxpayer must *produce* ‘competent, material and substantial’ evidence . . .” (emphasis added)); *In re Appeal of Lane Co.*, 153 N.C. App. 119, 127, 571 S.E.2d 224, 229 (2002) (“the substantial rights afforded by the presumption of correctness are lost when the taxpayer *offers* substantial rebutting evidence” (emphasis added)). Indeed, *AMP* itself states that “for the taxpayer to rebut the

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presumption he must *produce* ‘competent, material and substantial’ evidence that *tends to show*” an arbitrary or illegal method of valuation. 287 N.C. at 563, 215 S.E.2d at 762 (emphasis added).

In this case, the Commission’s decision does not reflect this burden shifting. In the opening “Statement of Facts and Case” contained in the decision below, the Commission stated: “In order to rebut the presumption of correctness, the taxpayer *must prove* that Durham County used an arbitrary or illegal method of valuation and that the assessment of the subject property substantially exceeded the true value in money of the property as of January 1, 2001.” (Emphasis added.) In addition, in the section discussing the issues presented by the hearing, the Commission, after citing *AMP*, stated that “IBM Credit *has the burden of establishing*: 1. The County employed an arbitrary or illegal method of appraisal” (Emphasis added.) Conclusion of Law 3 of the decision contains substantially the same articulation of the burden of proof: “In order for the taxpayer to rebut the presumption of correctness, the taxpayer *must prove* that the county tax assessor employed an arbitrary or illegal method of valuation and that the assessment of the property *substantially* exceeded the true value in money of the subject property.” (First emphasis added.)

In these three statements, the Commission has imposed a burden of persuasion on IBM Credit rather than a burden of production, contrary to the express requirements of *Southern Railway*. Curiously, the Commission never referred to the Supreme Court’s decision in *Southern Railway*, although it did reference the Court of Appeals decision in that case, indicating that the Court of Appeals opinion had been reversed “on other grounds.”

In Conclusion of Law 9, the Commission does state: “IBM Credit did not produce competent, material and substantial evidence *to show* that Durham County employed an arbitrary or illegal method of valuation to determine the valuation of subject business personal property. IBM Credit *failed to show* that use of the Department of Revenue’s Cost Index and Depreciation Schedules for computer and computer-related equipment resulted in a valuation that *substantially* exceeded the true value in money of the subject property for tax year 2001.” (First two emphases added.) Although this conclusion substantially parrots *AMP*, it differs from *AMP* in a significant way.

The Commission—consistent with its earlier stated view that a burden of proof rested on IBM Credit—required in this conclusion of

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law that IBM Credit produce evidence “to show” that Durham County’s valuation method was arbitrary and capricious. *AMP*, however, only requires the production of evidence that “tends to show” that the method was arbitrary and capricious. 287 N.C. at 563, 215 S.E.2d at 762. Thus, even in Conclusion of Law 9, the Commission has placed a burden of proof on IBM Credit rather than a burden of production. In any event, given the prior three articulations improperly placing a burden of proof on IBM Credit, we cannot be assured by this single ambiguous statement that the Commission applied the burden-shifting framework mandated by *Southern Railway*, especially given the Commission’s failure to reference that opinion.

N.C. Gen. Stat. § 105-345.2(b) (2005) sets forth the applicable scope of review in this case and requires this Court, “[s]o far as necessary to the decision and where presented . . . [to] decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action.” After deciding essential questions of law, this Court is authorized, if necessary, to “remand the case for further proceedings.” *Id.*

We believe it is necessary to remand this case so that the Commission may apply the proper burden of proof framework. As this Court stated in a similar context:

Because the [State Personnel] Commission acted under a misapprehension of the law, this case must be remanded. *The rule fixing the burden of proof constitutes a substantial right of the party upon whose adversary the burden rests and must be rigidly enforced.* The law relating to the burden of proof is equally applicable to proceedings which are not conducted before a jury. We cannot say, as a matter of law, that the Commission’s finding was not affected by its misapprehension of the law. Therefore, we vacate the findings and conclusions and remand this case to the Commission for reconsideration of the evidence in additional proceedings in which petitioner has the burden of proof.

Eaker, 90 N.C. App. at 36-37, 367 S.E.2d at 397 (emphasis added) (internal citations omitted). Here, too, we cannot determine with certainty whether the Commission’s misunderstanding of the relevant burdens set forth in *AMP* and *Southern Railway* affected its findings and conclusions.

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Therefore, we remand this case to the Property Tax Commission for reconsideration of the evidence in accord with this opinion. Given our resolution of this appeal, we do not address IBM Credit's remaining arguments.

Remanded.

Judge ELMORE concurs.

Judge TYSON dissents in a separate opinion.

TYSON, Judge dissenting.

The majority's opinion holds the Commission erroneously imposed a burden of persuasion on IBM Credit rather than a burden of production, contrary to the express requirements of *In re Southern Railway*, 313 N.C. 177, 328 S.E.2d 235 (1985). The majority's opinion argues the Commission impermissibly placed the burden of proof on IBM Credit. I disagree and vote to affirm the Commission's final decision. I respectfully dissent.

I. Standard of Review

This Court reviews the Commission's decision under the whole record test. The whole record test is *not a tool of judicial intrusion* and this Court only considers whether the Commission's decision has a rational basis in the evidence. *We may not substitute our judgment for that of the Commission even when reasonably conflicting views of the evidence exist.*

In re Weaver Inv. Co., 165 N.C. App. 198, 201, 598 S.E.2d 591, 593 (emphasis supplied) (internal citations and quotations omitted), *disc. rev. denied*, 359 N.C. 188, 606 S.E.2d 695 (2004).

II. Burden on the Taxpayer

The majority's opinion holds the Commission's final decision impermissibly placed the burden of proof on IBM Credit by stating in their findings and conclusions: (1) "In order to rebut the presumption of correctness, the taxpayer *must prove* that Durham County used an arbitrary or illegal method of valuation and that the assessment of the subject property substantially exceeded the true value in money of the subject property;" (2) IBM Credit *failed to show* that use of the Department of Revenue's Cost Index and Depreciation Schedules for computer and computer related equipment resulted in a valuation

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that substantially exceeded the true value in money of the subject property for tax year 2001;" and (3) "IBM has *the burden of establishing*: 1. [t]he County employed an arbitrary or illegal method of appraisal, and 2. [t]he value assigned by the County Board was substantially greater than the true value in money of the property as of January 1 for the year at issue." (Emphasis supplied).

The majority's opinion asserts the words, "must prove," "failed to show," and "burden of establishing," charged IBM Credit with and increased the burden of persuasion. I disagree.

Our Supreme Court has held it is "a sound and a fundamental principle of law in this State that ad valorem tax assessments are presumed to be correct." *In re Appeal of AMP, Inc.*, 287 N.C. 547, 562, 215 S.E.2d 752, 761 (1975). "As a result of this presumption, when such assessments are attacked or challenged, the burden of proof is on the taxpayer *to show* that the assessment was erroneous." *Id.* at 562, 215 S.E.2d at 762 (emphasis supplied).

[T]o rebut this presumption [the taxpayer] *must* produce competent, material and substantial evidence that *tends to show* that: (1) Either the county tax supervisor used an arbitrary method of valuation; or (2) the county tax supervisor used an illegal method of valuation; and (3) the assessment substantially exceeded the true value in money of the property.

Id. at 563, 215 S.E.2d at 762 (emphasis supplied) (internal quotations omitted).

The standard articulated in *In re Appeal of AMP, Inc.* places the burden of proof upon the taxpayer "to show" that the assessment was erroneous. The word "show" is defined as "[t]o make (facts, etc.) apparent or clear by evidence; *to prove*." *Black's Law Dictionary* (8th ed. 2004) (emphasis supplied). Following this definition, the *AMP* standard could be read as "the burden is on the taxpayer *to prove* that the assessment was erroneous" and the "taxpayer must produce evidence that *tends to prove*" the essential factors needed.

Our Supreme Court has used similar language to the Commission's findings and conclusions in articulating the *AMP* standard. In *In re McElwee*, our Supreme Court stated, "the taxpayer has the *burden of showing* that the assessment was erroneous." 304 N.C. 68, 72, 283 S.E.2d 115, 120 (1981) (emphasis supplied).

[T]he presumption is that the county acted with regularity in the valuation process, and the burden is upon the taxpayer *to show*

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otherwise. At this point, the taxpayer *must show* by competent, material and substantial evidence that one of the first two tests enunciated in *Amp* has not been met, *i.e.*, either that the county employed an arbitrary or an illegal method of valuation.

Id. at 86, 283 S.E.2d at 126 (emphasis supplied).

In its final decision, the Commission used substantially similar language to that enunciated by our Supreme Court to place the burden on the taxpayer to overcome the presumption that the assessment by the Commission was lawful, correct, and not arbitrary. The Commission did not impermissibly shift the burden of persuasion and properly held IBM Credit failed to overcome the presumption of correctness of Durham County's valuation. The final decision should be affirmed.

III. Presumption of Correctness

IBM Credit argues the Commission erred by concluding it did not produce competent, material, and substantial evidence to show Durham County employed an arbitrary or illegal method of valuation to determine the value of the property and the assessment substantially exceeded the true value in money of the property. I disagree.

"The North Carolina General Assembly has adopted market value or true value in money as the uniform appraisal standard for valuation of property for tax purposes." *Electric Membership Corp. v. Alexander*, 282 N.C. 402, 408-09, 192 S.E.2d 811, 816 (1972) (internal citations and quotations omitted).

N.C. Gen. Stat. § 105-283 (2005), in relevant part, states:

All property, real and personal, shall as far as practicable be appraised or valued at its true value in money. When used in this Subchapter, the words "true value" shall be interpreted as meaning market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used.

IBM Credit argues Durham County's use of the North Carolina Department of Revenue U-5 Schedule for valuation of their property was illegal because Durham County did not determine actual market-place value as required by the statute.

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As discussed above, “[A]d valorem tax assessments are presumed to be correct. As a result of this presumption, when such assessments are attacked or challenged, the burden of proof is on the taxpayer to show that the assessment was erroneous.” *In re Appeal of AMP, Inc.*, 287 N.C. at 562, 215 S.E.2d at 761-62.

The purpose underlying this presumption of correctness arises out of the obvious futility of allowing a taxpayer to fix the final value of his property for purposes of ad valorem taxation. If the presumption did not attach, then every taxpayer would have unlimited freedom to challenge the valuation placed upon his property, regardless of the merit of such challenge.

Id. at 563, 215 S.E.2d 762 (internal citations omitted). To overcome this presumption, the taxpayer must “produce competent, material and substantial evidence that tends to show that: (1) Either the county tax supervisor used an arbitrary method of valuation; or (2) the county tax supervisor used an illegal method of valuation; and (3) the assessment substantially exceeded the true value in money of the property.” *Id.* at 563, 215 S.E.2d at 762. “[It] is the function of the [Commission] to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence.” *In re McElwee*, 304 N.C. at 87, 283 S.E.2d at 126-27. This Court “cannot substitute [its] judgment for that of the agency when the evidence is conflicting.” *Id.*

IV. Conclusion

It is incumbent upon IBM Credit to “show” or prove to the Commission that Durham County’s valuation of its property was not equivalent to the actual value or true value of the property. *In re Appeal of AMP, Inc.*, 287 N.C. at 563, 215 S.E.2d at 762. The Commission found IBM Credit presented no credible evidence of the actual fair market value of its property.

The Commission correctly held that IBM Credit failed to present evidence to show and overcome the presumption of correctness and affirmed Durham County’s valuation. The presumption exists to prevent taxpayers from setting their own values to reduce their tax liability, which “increases the tax burden borne by others.” *In re Appeal of Worley*, 93 N.C. App. 191, 195, 377 S.E.2d 270, 273 (1989). In light of IBM Credit’s failure to overcome the presumption of correctness, no burden was shifted to Durham County. The Commission’s final decision should be affirmed. I respectfully dissent.

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STATE OF NORTH CAROLINA v. THEODORE JERRY WILLIAMS

No. COA06-1563

(Filed 2 October 2007)

1. Obstruction of Justice— attempted intimidation of witness—letter from prison—evidence not sufficient

The evidence of attempted intimidation of a witness was not sufficient where it consisted of a letter defendant wrote from jail to a witness in another case. The letter was not threatening, coercive, or menacing, does not hint at bodily harm or violence, contains no cursing, vulgarity, threatening language, maintains a courteous tone throughout, asks the witness to think things over and talk with an attorney, and urges her to follow the law.

2. Attorneys— unauthorized practice of law—letter from prison—evidence not sufficient

Evidence of unauthorized practice of law was not sufficient where it consisted of a letter defendant wrote from jail to a witness in someone else's case, with an attached suggested affidavit. Among other points, defendant did not hold himself out as an attorney, repeatedly urged the witness not to rely on him and to seek advice from an attorney, and the affidavit was a blank handwritten form accompanied by a handwritten paragraph suggested for inclusion, with cross-outs and corrections.

Appeal by defendant from judgment entered 22 February 2006 by Judge Mark E. Klass in Stanly County Superior Court. Heard in the Court of Appeals 22 August 2007.

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz,, for the State.

Richard E. Jester for defendant-appellant.

SMITH, Judge.

Theodore Williams (defendant) appeals from judgment entered on his convictions of attempting to intimidate a witness, practicing law without a license, and having the status of an habitual felon. We reverse.

On 13 November 2003 defendant was arrested on criminal charges unrelated to the present appeal, and was placed in the Stanly

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County jail. While in jail awaiting trial, defendant became friendly with a man he knew as “Dennis Scott” or “James Scott Dennis” (hereinafter “Scott”). Scott was in jail on charges of second degree kidnapping and rape of Lea Andrea Blackwell. On 19 December 2003 defendant wrote Blackwell a letter discussing Scott’s case. A jail employee read defendant’s letter to Blackwell, and gave a copy to the Stanly County District Attorney. On the basis of this letter, defendant was indicted on charges of solicitation of perjury, intimidation of a witness, and practicing law without a license. Before trial, the State dismissed the charge of solicitation of perjury. The State later filed a superceding indictment that amended the charge of intimidating a witness to a charge of attempted intimidation of a witness. Additionally, by a separate indictment, defendant was charged with being a habitual felon.

Defendant was tried before a Stanly County jury in February 2006. Shortly before the trial, defendant’s attorney was disbarred, and defendant elected to represent himself. Following the presentation of evidence, defendant was convicted of attempting to intimidate a witness, practicing law without a license, and having the status of a habitual felon. He received an active sentence of 121 to 155 months imprisonment. From these convictions and judgment, defendant timely appealed.

[1] Defendant argues first that the trial court erred by denying his motion to dismiss the charges against him of unauthorized practice of law and attempting to intimidate a witness, on the grounds that the evidence was insufficient to submit the charges to the jury. We agree.

When a criminal defendant moves for dismissal on the grounds that the evidence is legally insufficient:

The trial court must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion. In considering a motion to dismiss, the trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence. The trial court must also resolve any contradictions in the evidence in the State’s favor. The trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness’ credibility.

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State v. Parker, 354 N.C. 268, 278, 553 S.E.2d 885, 894 (2001) (internal quotation marks and citations omitted).

In the instant case, the physical evidence against defendant consisted entirely of the letter defendant wrote to Blackwell. Defendant does not dispute that he wrote the letter and addressed it to Blackwell. Therefore, the only question is whether the letter provided a legally sufficient basis to convict defendant of the charged offenses. The letter was handwritten on paper provided by the Stanly County jail, and reads as follows:

Dear Lea,

Hello, I hope this letter finds you in good health and spirits. First of all, please let me apologize for intruding into your affairs, but please let me assure you I mean no harm in any way, and I'm simply trying to help you and another person whom I have recently established a friendship with.

Lea, I'm writing this letter because I've unfortunately been dealing with the law for more than 20 years and let me testify and I don't like to see it ruin people's lives. So please don't get angry or upset, and please hear me out before you render a decision. Lea, Scott is in jail for some very serious charges, charges of which if he is convicted could seriously ruin the rest of his life, not to mention cause him to spend the next 10 to 15 years in prison. So no matter how angry you are, let me ask you a question. Is that what you want?

Even if Scott is not convicted, he could easily spend the next two or three years in jail awaiting a trial. That will most likely be the case. Because if you don't show up for court, the district attorney will just keep asking the Judge for a continuance until he gets you served with a subpoena. All the while, Scott will be kept in jail.

Now, if you don't show up after being subpoenaed, the Judge can order you arrested and then held in jail until Scott's trial, which is the law, meaning you will not have a bond, but rather held in jail until the State's through with you or until Scott's next court date. Further, Lea, I haven't known Scott that long, but he just doesn't strike me as the rapist type. Now, I don't know what happened, I wasn't there, and I am not disputing what you said. But Scott swears he didn't do what you said, and several people are prepared to testify he didn't either.

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What I'm trying to say is, if you take the stand and get caught in a lie, it's called perjury. I also understand you have quite a record yourself. Well, if you get convicted of perjury, it could mean you have to do five to seven years in prison mandatory. I'm sure you don't want that. Neither does Scott. Nor do I, for that matter. Prison is a terrible place to waste away. Lea, Scott tells me you're not a bad person at all. In fact, Scott still loves you and doesn't understand how things got so out of control to where neither of you can possibly benefit from all this. The best you guys can hope for is to stop this before it gets worse.

So Lea, I'm asking you to help yourself and Scott. I'm not asking you to trust me blindly, but rather go see Scott's attorney, Patrick Currie in Oakboro or call him at 983-6116 and find out for yourself if what I'm saying isn't the best course of action for you both. Lea, the best way to get Scott out of jail and not get in trouble yourself is to go to Scott's lawyer and get an affidavit. I am gonna enclose with this letter a handwritten affidavit form and a brief paragraph to what you should write on the form. This affidavit has to be notarized. If you are scared, just write the affidavit and lay low.

Lea, I hope you will listen to me. I know I don't know you, nor do you know me. But I love God and I really do wish you well. Please think about what I said and do some investigating. If you doubt me, Scott's lawyer will talk to you. Or if not that lawyer, at least find another lawyer.

Take care. Thank you. And God bless.

Sincerely, Ted Williams.

The letter separately contained a handwritten outline of the heading of a pleading, as follows:

STATE OF NORTH CAROLINA GENERAL COURT OF JUSTICE
 SUPERIOR COURT DIVISION
 COUNTY OF STANLY CASE #
 STATE OF NORTH CAROLINA)
)
 Vs.) AFFIDAVIT
)
 JAMES SCOTT DENNIS)
 Defendant.)

I _____ do hereby depose and say

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[Blank for several lines.]

This the ____ day of _____

Signature _____

The letter also included this handwritten paragraph:

That James Dennis has not forced me in any [way] into having sexual relations with him. Myself and Mr. Scott have lived together for approximately three years during this time we have enjoyed mutual consensual sex for the duration of our relationship. The only reason I made the statement that lead to Mr. Dennis arrest is because I made the statement under duress and was somewhat coerced into doing so by the Detective. If called to testify in that case I will exercise my right under the 5th Amendment in order to prevent self incrimination.

We first consider whether this letter constituted sufficient evidence to support the charge of attempted intimidation of a witness. Intimidation of a witness is defined in N.C. Gen. Stat. § 14-226(a) (2005), which provides that:

If any person shall by threats, menaces or in any other manner intimidate or attempt to intimidate any person who is summoned or acting as a witness in any of the courts of this State, or prevent or deter, or attempt to prevent or deter any person summoned or acting as such witness from attendance upon such court, he shall be guilty of a Class H felony.

Review of the relevant case law addressing the sufficiency of evidence to sustain a conviction for intimidating a witness shows that such cases generally involve a threat by the defendant to inflict bodily harm on the witness. *See, e.g., In re R.D.R.*, 175 N.C. App. 397, 400, 623 S.E.2d 341, 344 (2006) (juvenile “stood up, turned toward [witness] and mouthed the words ‘I’m going to kick your a—’ ”); *State v. Isom*, 52 N.C. App. 331, 278 S.E.2d 327 (1981) (defendant telephoned witness and threatened to kill her daughter if witness did not drop charges); *State v. Neely*, 4 N.C. App. 475, 166 S.E.2d 878 (1969) (defendant threatened witness; Court notes that “language used would indicate physical violence”).

We also find the holding of *State v. Braxton*, 183 N.C. App. 36, 643 S.E.2d 637 (2007), to be instructive. The defendant in *Braxton* was indicted on eleven counts of intimidating a witness “by means of threats.” *Id.* at 43, 643 S.E.2d at 642. This Court held that, inasmuch

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as the indictments were based on a theory of threats, the State was required to produce evidence of threats. The evidence showed one instance where defendant left a vulgar, angry voice mail message for the witness, with abusive language and explicit threats of bodily harm. This Court held that this was sufficient to show an attempt to intimidate by means of threats, and thus to submit one count to the jury. However, the balance of the evidence on this issue showed that defendant had:

“encouraged Russell to dismiss the charges against him, to not show up in court, and to write an affidavit to the District Attorney saying that she made everything up and that the charges were false. Defendant specifically instructed Russell as to what to include in the affidavit, and that it must state that he did not choke her and that he never intimidated her.

Id. at 44, 643 S.E.2d at 643. This Court held that such evidence was insufficient to show the use of threats:

[W]e hold that the voice mail message . . . is the only incident from which the jury could have found that defendant committed the offense of intimidating a witness. Defendant’s strong and harsh language, coupled with the evidence of their volatile and violent relationship, constituted sufficient evidence such that a reasonable mind could find the message to be threatening. Russell’s testimony that defendant told her “at least ten” times not to testify is not sufficient to show that defendant threatened her in any way[.]

Id.

In the instant case, the indictment alleged that defendant had “by menaces and coercive statements attempt[ed] to deter and prevent Andrea Blackwell from attending court by sending Andrea Blackwell a letter[.]” Accordingly, as in *Braxton*, the State was required to prove that defendant attempted to intimidate Blackwell “by menaces and coercive statements.” “Menace” is defined in the Oxford Encyclopedic English Dictionary 902 (Judy Pearsall and Bill Trumble, eds., Oxford University Press 2d ed. 1995) as a noun meaning “a threat” and as a verb meaning “to threaten, especially in a malignant or hostile manner.” “Coerce” is defined in the Oxford Encyclopedic English Dictionary 280 as a verb meaning “persuade or restrain (an unwilling person) by force” (parentheses in original); and in Black’s Law Dictionary 252 (7th ed. 1999) as a verb meaning “to compel by

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force or threat.” Thus, the words menace and coerce are defined as basically synonymous with “threat.”

We have examined defendant’s letter and find it neither threatening, coercive, or menacing. It opens with an apology for intruding and reassurance that defendant means no harm. Defendant acknowledges that he was not present when the relevant events occurred, and that his view of the situation is derived from his brief acquaintance with Scott. He admits that he does not know Blackwell, and therefore is “not disputing what [she] said.” The letter cautions Blackwell to honor a subpoena if one is issued, and warns her that perjury is a criminal offense that may result in a significant prison sentence. Defendant also suggests that if Blackwell wants to end legal proceedings against Scott, she should execute an affidavit, rather than ignoring a subpoena. The letter also asks Blackwell not to rely on defendant’s word, but to consult with an attorney before doing anything, gives the name and number of Scott’s attorney, and asks that “if not that lawyer, at least find another lawyer.” Defendant ends by asking Blackwell to think things over and to talk with an attorney.

Significantly, defendant’s letter nowhere hints at bodily harm or violence against Blackwell, contains no cursing, vulgarity, or threatening language, and maintains a courteous tone throughout. Defendant’s admonitions to Blackwell to honor any subpoena that might be issued and to avoid perjury are not presented as personal threats. Indeed, defendant urges Blackwell to follow the law. Our review of defendant’s letter in the context of *Braxton* and other pertinent jurisprudence leads us to conclude that the letter did not constitute sufficient evidence of defendant’s intentional attempt to intimidate a witness, and his conviction for this offense must be reversed.

[2] We next determine whether the letter and accompanying pages that defendant sent to Blackwell constituted the unauthorized practice of law. The unauthorized practice of law is barred by N.C. Gen. Stat. § 84-4 (2005), which provides in relevant part that:

. . . [I]t shall be unlawful for any person or association of persons, except active members of the Bar of the State of North Carolina admitted and licensed to practice as attorneys-at-law, to appear as attorney or counselor at law in any action . . . and it shall be unlawful for any person . . . except active members of the Bar . . . to prepare . . . any will or testamentary disposition, or instrument of trust, or . . . any other legal document. . . .

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N.C. Gen. Stat. § 84-8 (2005) makes violation of G.S. § 84-4 a Class 1 misdemeanor, and N.C. Gen. Stat. § 84-2.1 (2005) defines “practice law” in relevant part as follows:

The phrase “practice law” as used in this Chapter is defined to be performing any legal service for any other person . . . including the preparation or aiding in the preparation of deeds, mortgages, wills, trust instruments, inventories, accounts or reports of guardians, trustees, administrators or executors, . . . or assisting by advice, counsel, or otherwise in any legal work; and to advise or give opinion upon the legal rights of any person[.] . . . [T]he above reference to particular acts . . . shall not be construed to limit the foregoing general definition of the term, but shall be construed to include the foregoing particular acts, as well as all other acts within the general definition.

The proper application of G.S. § 84-4 most often arises in commercial contexts, and has been held to bar a corporation from representing itself, *see Lexis-Nexis v. Travishan Corp.*, 155 N.C. App. 205, 209, 573 S.E.2d 547, 549 (2002) (“in North Carolina a corporation must be represented by a duly admitted and licensed attorney-at-law”); to bar an attorney working for an insurance corporation from representing an insured of the corporation, *see Gardner v. North Carolina State Bar*, 316 N.C. 285, 341 S.E.2d 517 (1986); and to prevent a corporation from offering legal services to its clients, *Seawell v. Carolina Motor Club, Inc.*, 209 N.C. 624, 184 S.E. 540 (1936). However, “[i]t was not the purpose and intent of the statute to make unlawful all activities of lay persons which come within the general definition of practicing law . . . its purpose is for the better security of the people against incompetency and dishonesty in an area of activity affecting general welfare.” *State v. Pledger*, 257 N.C. 634, 637, 127 S.E.2d 337, 339 (1962).

In the instant case, defendant was charged in an indictment alleging that he had “give[n] unsolicited legal advice to Andrea Blackwell and prepare[d] a legal document, an affidavit[.]” We conclude that defendant’s letter did not constitute the unauthorized practice of law. Defendant did not hold himself out as an attorney, or as having a law degree, conceding that his information on the law was acquired through twenty years of being in trouble. His “legal counsel” was limited to general advice to come to court, tell the truth, and consider executing an affidavit. This letter did not constitute preparation of a “legal document” as we interpret the statute. The

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“legal document” was a blank affidavit form accompanied by a paragraph defendant suggested Blackwell might include in her affidavit. Both the blank affidavit and the paragraph were hand-written on sheets of paper supplied by the jail, and the paragraph contained cross-outs and corrections.

It is also significant that defendant repeatedly urged Blackwell not to rely on him and to seek advice from an attorney. Defendant provided the name and number of Scott’s lawyer, and stressed that if she did not want to call that attorney, she should “at least find another lawyer.” We further note that the sole letter that defendant wrote Blackwell does not include any suggestion of further contact between them; defendant nowhere asks her to answer his letter or suggests that he might follow up on his letter.

Defendant took it upon himself to write a letter from jail to a witness in another case, and to offer his opinions and views on the matter. In this, he was a meddlesome busybody, and may have wanted to display his “wisdom” on various matters. However, such behavior does not rise to the level of a criminal offense. The State has cited no cases, and we find none, wherein a criminal defendant was convicted of either attempted intimidation of a witness or practicing law without a license on the basis of a single letter in the nature of the letter at issue herein. We conclude that the letter was insufficient evidence to submit the charged offenses to the jury, and that defendant’s convictions must be reversed. Further, as defendant’s conviction of being a habitual felon was dependent upon the felony conviction of attempted intimidation of a witness, this also must be reversed.

Our resolution of this issue makes it unnecessary to address defendant’s other arguments. For the reasons discussed above, we conclude that defendant’s convictions must be

Reversed.

Judges McGEE and STEPHENS concur.

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STATE OF NORTH CAROLINA v. FLOYD JEAN DAVIS

No. COA06-1558

(Filed 2 October 2007)

1. Criminal Law— motion for mistrial—defendant’s absence from courtroom during trial—voluntary and unexplained absence—waiver of right

The trial court did not abuse its discretion in a felony possession of methamphetamine, misdemeanor possession of drug paraphernalia, and habitual felon case by denying defendant’s motion for a mistrial based on his absence from the courtroom during his trial, because: (1) a defendant’s voluntary and unexplained absence from court subsequent to the commencement of trial constitutes a waiver of his right to confront his accuser, and waiver is inferred unless defendant meets his burden to explain his absence; and (2) the facts support the determination that defendant waived his right to appear.

2. Drugs— felony possession of methamphetamine—misdemeanor possession of drug paraphernalia—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant’s motions to dismiss the charges of felony possession of methamphetamine and misdemeanor possession of drug paraphernalia because the evidence was sufficient as a matter of law to withstand the motions.

3. Sentencing— habitual felon—defendant not present in courtroom

The trial court did not err by arraigning defendant as an habitual felon under N.C.G.S. § 15A-928 in open court, and by moving forward immediately with habitual felon proceedings following defendant’s convictions while he was still not present in the courtroom, because: (1) even assuming defendant is correct in his argument that he was required to be present for the habitual felon proceedings since they concerned a sentence enhancement, he failed to show any prejudicial effect resulting from his absence; (2) defendant was informed of the previous convictions the State intended to use and was given a fair opportunity to either admit or deny them or remain silent; and (3) the Court of Appeals has previously found no error when a trial court moved forward with habitual felon proceedings after they had already

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begun and a defendant failed to return to court following a five-minute recess.

Appeal by defendant from judgment entered 14 July 2006 by Judge Richard L. Doughton in Superior Court, Mitchell County. Heard in the Court of Appeals 21 August 2007.

Attorney General Roy Cooper, by Assistant Attorney General Laura J. Gendy, for the State.

William D. Spence, for defendant-appellant.

WYNN, Judge.

A defendant may waive the general right to be present at his trial through his voluntary and unexplained absence from court.¹ Here, Defendant Floyd Jean Davis contends the trial court erred by allowing his trial to proceed in absentia. Because the record shows that Defendant had knowledge of the date and time that his trial reconvened and failed to appear or provide any reasonable excuse for his absence, we affirm the trial court's decision to move forward with the proceedings without Defendant.

On 26 January 2006, Mitchell County Deputy Sheriff Frank Catalano went to Defendant's home to serve an arrest warrant on him. Pursuant to a consent search of Defendant's home, Deputy Catalano found a pen barrel, scale, and piece of folded-up aluminum foil inside a plastic grocery bag in a kitchen drawer. A charred residue on the aluminum foil was later determined to be a legal substance often converted into methamphetamine; additionally, the inside of the pen barrel was found to be coated with methamphetamine hydrochloride, a controlled substance. After being advised of his legal rights, Defendant stated that the methamphetamine found was his and that he used the drug to relieve back pain.

Defendant's trial for felony possession of methamphetamine, misdemeanor possession of drug paraphernalia, and habitual felon status began on 20 June 2006; he and his defense counsel were both present, and the jury was selected that day. When court reconvened the following morning, on 21 June 2006, Defendant was absent because he had gone to Spruce Pine Community Hospital with heart problems and was subsequently transferred by ambulance to Mission Memorial Hospital in Asheville due to chest pains and to have an

1. *State v. Richardson*, 330 N.C. 174, 178, 410 S.E.2d 61, 63 (1991).

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“appropriate workup by the cardiologist.” Following testimony by a doctor who had treated Defendant, the trial court continued the case until 30 June 2006.

When court reconvened again on 30 June 2006, Defendant was not present. Defense counsel informed the trial court that he did not know where his client was, and that he had spoken to Defendant the previous afternoon and instructed him to be at court that morning. Additionally, defense counsel told the trial court that he had no medical records showing that Defendant was unable to be present at court that morning. The clerk likewise stated that Defendant had been informed and was aware of his court date and time. Neither defense counsel nor the clerk’s office had received any message from Defendant as to why he was not present in court on 30 June 2006.

After denying defense counsel’s motion for mistrial based on Defendant’s absence, the trial court instructed the State to move forward with presentation of its evidence to the jury. The State offered testimony from two witnesses: a Special Agent Senior Forensic Chemist with the North Carolina State Bureau of Investigation (SBI), as to the residues on the aluminum foil and the inside of the pen barrel, respectively; and Deputy Catalano, as to his search of Defendant’s home and Defendant’s voluntary statement after his arrest. Defendant did not offer any evidence, and defense counsel moved for a dismissal of the two charges for insufficiency of evidence at both the close of the State’s evidence and the close of all evidence. After denying the motions to dismiss, the trial court moved forward with the charge conference, the prosecutor and defense counsel offered closing arguments, and the trial court gave his jury charge.

According to the transcript, the jury returned guilty verdicts on both charges after ten minutes of deliberation. With Defendant still absent from the courtroom, the trial court moved forward with the habitual felon phase of the trial. The State then offered an additional witness, a legal assistant with the district attorney’s office, who testified as to Defendant’s criminal record and prior felony convictions. Defendant offered no evidence. After an additional ten minutes of deliberation, the jury returned with a verdict of guilty of habitual felon status.

The trial court had previously entered an order of arrest against Defendant because he was not present when his trial reconvened on 30 June 2006. At the conclusion of the trial, the trial court ordered that, after Defendant had been located and arrested, he be held with-

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out bond until sentencing could occur. On 14 July 2006, the trial court entered judgment on the jury verdicts against Defendant and sentenced him as an habitual felon in the presumptive range of 116 to 149 months' imprisonment on the consolidated charges of felony possession of methamphetamine and misdemeanor possession of drug paraphernalia. At sentencing, Defendant informed the trial court that he had been back in the hospital for his heart on 30 June 2006, the date of his trial, and his wife had failed to telephone defense counsel as she had promised. Defendant offered no written documentation in support of his statement that he had been in the hospital.

Defendant now appeals, arguing that the trial court erred by (I) denying his motion for a mistrial; (II) denying his motion to dismiss both charges at the close of evidence; (III) arraigning him as an habitual felon in open court and allowing the State to move forward immediately with habitual felon proceedings.

I.

[1] Defendant first argues that the trial court erred by denying his motion for a mistrial based on his absence from the courtroom during his trial. We disagree.

Under North Carolina law, a trial court is required to declare a mistrial upon a defendant's motion "if there occurs during the trial an error or legal defect in the proceedings, . . . , resulting in substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. § 15A-1061 (2005). Nevertheless, the decision to grant a mistrial is within the sound discretion of the trial court, and a mistrial is "appropriate only when there are such serious improprieties as would make it impossible to achieve a fair and impartial verdict under the law." *State v. Black*, 328 N.C. 191, 200, 400 S.E.2d 398, 403 (1991) (citation omitted). The trial court's decision will be given "great deference since he is in a far better position than an appellate court to determine whether the degree of influence on the jury was irreparable." *State v. Williamson*, 333 N.C. 128, 138, 423 S.E.2d 766, 772 (1992) (citation omitted). This Court will find an abuse of discretion only where a trial court's ruling "is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Campbell*, 359 N.C. 644, 673, 617 S.E.2d 1, 19 (2005), *cert. denied*, 547 U.S. 1073, 164 L. Ed. 2d 523 (2006).

Although our state Constitution provides that, "[i]n all criminal prosecutions, every person charged with crime has the right . . . to confront the accusers and witnesses with other testimony," N.C.

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Const. art. I, § 23, the right of a defendant to be present at his own trial is not absolute. *See State v. Richardson*, 330 N.C. 174, 178, 410 S.E.2d 61, 63 (1991) (“In noncapital felony trials, this right to confrontation is purely personal in nature and may be waived by a defendant.”). Significantly, “[a] defendant’s voluntary and unexplained absence from court subsequent to the commencement of trial constitutes such a waiver. Once trial has commenced, the burden is on the defendant to explain his or her absence; if this burden is not met, waiver is to be inferred.” *Id.* (internal citations omitted).

Here, Defendant’s trial commenced on 20 June 2006, when a jury was impaneled and opening arguments were made. Defendant was not present when his trial resumed on 21 June; after hearing an explanation from defense counsel and testimony from a doctor who had treated Defendant, the trial court continued the case until 30 June, to give Defendant an opportunity for further treatment and recovery. Nevertheless, on 30 June, Defendant was not present at the time his trial was scheduled to resume.

After waiting for over forty-five minutes, the trial court ascertained that Defendant was aware of the date and time that his trial was scheduled to resume, and that he had failed to provide any reason or notice to defense counsel or the clerk’s office as to his failure to appear. The trial court then offered a full restatement of the facts related to the earlier session of the trial, Defendant’s medically excused absence on 21 June 2006, and the continuance, and concluded:

Based on that, the Court concludes that the Court has a right to go forward with the trial of this case having been shown no good reason as to why the defendant has not appeared and based on the foregoing findings and conclusions the Court is going to proceed with the trial of this matter in the absence of the defendant So [defense counsel] will be proceeding on behalf of his client in his client’s absence in the defense of this case.

These facts support the trial court’s determination that Defendant waived his right to appear, and we see no abuse of discretion in the trial court’s decision to deny defense counsel’s motion for a mistrial. Accordingly, we find no merit in these assignments of error.

II.

[2] Next, Defendant contends the trial court erred by denying his motions to dismiss the charges of felony possession of metham-

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phetamine and misdemeanor possession of drug paraphernalia at the close of the State's evidence and again at the close of all evidence on the grounds that the evidence was insufficient to establish each element of the crimes and Defendant's identity as the perpetrator. We disagree.

To survive a motion to dismiss, the State must have presented "substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Garcia*, 358 N.C. 382, 412, 597 S.E.2d 724, 746 (2004) (citation and quotations omitted), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005). "Substantial evidence" is "relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion." *Id.* (citations omitted). In considering a motion to dismiss by the defense, such evidence "must be taken in the light most favorable to the state. . . . [which] is entitled to all reasonable inferences that may be drawn from the evidence." *State v. Sumpter*, 318 N.C. 102, 107, 347 S.E.2d 396, 399 (1986).

North Carolina law makes it illegal for any person to possess a controlled substance. N.C. Gen. Stat. § 90-95(a)(3) (2005). Felonious possession of a controlled substance has "two essential elements. The substance must be possessed, and the substance must be 'knowingly' possessed." *State v. Rogers*, 32 N.C. App. 274, 278, 231 S.E.2d 919, 922 (1977). Moreover, "[w]hen such materials are found on the premises under the control of the accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession." *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972). Even a "residue quantity" of a controlled substance is sufficient to convict a defendant of felonious possession of the controlled substance. *State v. Williams*, 149 N.C. App. 795, 798-99, 561 S.E.2d 925, 927, *disc. review denied*, 355 N.C. 757, 566 S.E.2d 481, *cert. denied*, 537 U.S. 1035, 154 L. Ed. 2d 455 (2002).

Likewise, under North Carolina law, "[i]t is unlawful for any person to knowingly use, or to possess with intent to use, drug paraphernalia . . . to inject, ingest, inhale, or otherwise introduce into the body a controlled substance which it would be unlawful to possess." N.C. Gen. Stat. § 90-113.22(a) (2005); *see also State v. Hedgecoe*, 106 N.C. App. 157, 164, 415 S.E.2d 777, 781 (1992) (holding that, to sustain a conviction under N.C. Gen. Stat. § 90-113.22, the State must prove that the defendant possessed drug paraphernalia with the intent "to use [it] in connection with controlled substances").

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In the instant case, the State offered testimony from an SBI agent that the residue inside the pen barrel found at Defendant's home was methamphetamine, and that the residue on the aluminum foil was a legal, uncontrolled substance that is often converted into methamphetamine. Deputy Catalano also testified that he found the aluminum foil and the pen barrel inside a kitchen drawer in Defendant's home. Additionally, Deputy Catalano recounted Defendant's voluntary statement to police that:

On today's date officer came to serve his warrant on me. I come out on my own. *They found meth in my house. I told them it was mine.* I use it—I use for my—for my pain because my back it was broke at work. The pain med they give me don't work. The meth does. . . . They found it in my kitchen drawer.

(Emphasis added). We find this evidence to be sufficient as a matter of law to withstand a motion to dismiss the charges of felony possession of methamphetamine and misdemeanor possession of drug paraphernalia. This assignment of error is rejected.

III.

[3] Finally, Defendant argues that the trial court erred by arraigning him as an habitual felon pursuant to North Carolina General Statutes § 15A-928 in open court, and by moving forward immediately with habitual felon proceedings following Defendant's convictions, while he was still not present in the courtroom. Defendant essentially contends the trial court was without subject matter jurisdiction to proceed with the habitual felon proceedings. We disagree.

Habitual felon status is acquired when any person has been convicted of or pled guilty to three felony offenses in any federal or state court or combination thereof. N.C. Gen. Stat. § 14-7.1 (2005). Under longstanding precedent of our courts, being an habitual felon is not a substantive offense and is instead used only to enhance the sentence of an underlying felony committed while the defendant was an habitual felon. *See State v. Allen*, 292 N.C. 431, 435, 233 S.E.2d 585, 588 (1977) ("The only reason for establishing that an accused is an habitual felon is to enhance the punishment which would otherwise be appropriate for the substantive felony which he has allegedly committed while in such a status.") Thus, "[b]eing an habitual felon is not a crime but is a status the attaining of which subjects a person thereafter convicted of a crime to an increased punishment for that crime. The status itself, standing alone, will not support a criminal sentence." *Id.*

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A trial court must arraign a defendant for habitual felon status “[a]fter commencement of the trial and before the close of the State’s case, . . . in the absence of the jury[.]” N.C. Gen. Stat. § 15A-928(c) (2005). If the defendant remains silent in the face of the allegations, “the State may prove that element of the offense charged before the jury as a part of its case.” *Id.* at § 15A-928(c)(2). The purpose of Section 15A-928 is “to insure that the defendant is informed of the previous convictions the State intends to use and is given a fair opportunity to either admit or deny them or remain silent.” *State v. Jernigan*, 118 N.C. App. 240, 244, 455 S.E.2d 163, 166 (1995).

As noted earlier, a defendant may waive his right to be present at his noncapital felony trial through his “voluntary and unexplained absence from court subsequent to the commencement of trial.” *Richardson*, 330 N.C. at 178, 410 S.E.2d at 63. However, our state Supreme Court has also held that a defendant “should be present when evidence is introduced for the purpose of determining the amount of punishment to be imposed.” *State v. Pope*, 257 N.C. 326, 330, 126 S.E.2d 126, 129 (1962). Likewise, “[t]he accused has the undeniable right to be personally present when sentence is imposed. Oral testimony, as such, relating to punishment is not to be heard in his absence.” *Id.* at 334, 126 S.E.2d at 132-33. Nevertheless, “[a] judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play.” *Id.* at 335, 126 S.E.2d at 133.

Defendant argues that the habitual felon proceedings fall between trial and sentencing, such that he could have waived his right to be present at his trial for the substantive offenses of felony possession of methamphetamine and misdemeanor possession of drug paraphernalia, but he was constitutionally required to be present for the habitual felon proceedings because they concerned a sentence enhancement. Nevertheless, even assuming *arguendo* that Defendant is correct in this assertion, we find that he has failed to show any prejudicial effect resulting from his absence. On 20 June 2006, at the outset of Defendant’s trial, and in Defendant’s presence but before a jury had been seated, the trial court stated that there were three charges, namely, “one possession of Schedule II controlled substances, one possession of drug paraphernalia and there’s a third indictment of habitual felon.” Moreover, in an indictment dated 8 February 2006, over four months before Defendant’s trial, the State

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listed the prior felonies committed by Defendant and used by the State as the basis for the charge of habitual felon status.

In light of these facts, as well as Defendant's waiver of his right to be present at trial, we find that Defendant was "informed of the previous convictions the State intend[ed] to use" and was "given a fair opportunity to either admit or deny them or remain silent." *Jernigan*, 118 N.C. App. at 244, 455 S.E.2d at 166. Moreover, we note that this Court has previously found no error when a trial court moved forward with habitual felon proceedings after they had already begun and a defendant failed to return to court following a five-minute recess. *State v. Skipper*, 146 N.C. App. 532, 535-36, 553 S.E.2d 690, 692-93 (2001). This assignment of error is without merit.

No error.

Judges HUNTER and BRYANT concur.

DEBRA BENNETT, EMPLOYEE, PLAINTIFF v. SHERATON GRAND, EMPLOYER,
CORNHUSKER INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA07-221

(Filed 2 October 2007)

1. Workers' Compensation— overpayment—credit denied

The Industrial Commission did not abuse its discretion by denying defendants a credit for amounts they had overpaid on a workers' compensation claim. The use of "may" in N.C.G.S. § 97-42 indicates that the decision to grant an employer a credit rests within the Commission's discretion.

2. Workers' Compensation— sanction—Commission not notified—plaintiff's right to compensation accepted

The Industrial Commission did not abuse its discretion in a workers' compensation case in the amount of the sanction it imposed on defendants for not notifying the Commission that it was accepting plaintiff's right to compensation. The issue arose when defendants discovered that they had been overpaying plaintiff and unilaterally reduced the payments; the sole reason for the

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sanction accruing as it did was defendants' failure to comply with N.C.G.S. § 97-18 for approximately five years.

3. Workers' Compensation— right to compensation—unilateral reduction

The Industrial Commission correctly concluded in a workers' compensation case that plaintiff's right to compensation arose under N.C.G.S. § 97-18(b) and constituted an award pursuant to N.C.G.S. § 97-87, and that defendants' unilateral reduction of plaintiff's compensation rate was contrary to N.C.G.S. § 97-47.

4. Workers' Compensation— overpayment—credit not allowed

The Industrial Commission did not abuse its discretion in a workers' compensation case by not allowing defendants a credit for an overpayment.

Appeal by defendants from opinion and award entered 16 October 2006 by Commissioner Thomas J. Bolch for the North Carolina Industrial Commission. Heard in the Court of Appeals 19 September 2007.

Brumbaugh, Mu & King, P.A., by Nicole D. Wray, for plaintiff-appellee.

Brotherton Ford Yeoman & Berry, PLLC, by Richard D. Yeoman and J. Jared Simms, for defendants-appellants.

TYSON, Judge.

Sheraton Grand ("Sheraton") and Cornhusker Insurance Company (collectively, "defendants") appeal from the Full Commission of the North Carolina Industrial Commission's ("the Commission") opinion and award entered granting Debra Bennett ("plaintiff") \$281.76 per week in indemnity payments from 25 June 1999 through 14 July 2005. We affirm.

I. Background

Plaintiff was employed by Sheraton and sustained an injury, which arose out of and in the course of her employment on 29 January 1999. Plaintiff's injury has resulted in wage loss since 25 June 2002.

Defendants began paying indemnity and medical benefits to plaintiff. Plaintiff's injury was not formally accepted by defendants

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as compensable as defendants failed to file either a Form 60, "Employer's Admission of Employee's Right to Compensation," or a Form 22, "Statement of Days Worked and Earning of Injured Employee," with the Commission at that time.

Sheraton paid plaintiff bi-weekly prior to her injury. In initially calculating plaintiff's average weekly wage and compensation rate, defendants erroneously calculated plaintiff's average weekly wage by dividing plaintiff's total annual wages by twenty-six weeks rather than fifty-two weeks. This resulted in a significant overstatement of plaintiff's average weekly wage. From 25 June 1999 through 20 February 2004, plaintiff was paid \$281.76 per week based upon an erroneous average weekly wage of \$422.62.

On 20 February 2004, defendants filed a Form 22 and Form 60 for the first time. Using limited payroll information, defendants recalculated plaintiff's average weekly wage to be \$245.63, which yielded a weekly compensation rate of \$163.76. Without seeking clearance or approval from the Commission, defendants unilaterally reduced their weekly payments to plaintiff from \$281.76 to \$163.76. The parties have since stipulated plaintiff's average weekly wage at the time of her injury was \$214.75, which yields a weekly compensation rate of \$143.17.

In March 2004, plaintiff requested that her claim be assigned for hearing. Defendants responded and asserted plaintiff had been grossly overpaid benefits due to computational errors in calculating plaintiff's average weekly wage. Defendants requested a credit for these overpayments against any future payments owed to plaintiff.

On 1 March 2005, the matter was heard before Deputy Commissioner Adrian A. Phillips ("Deputy Commissioner Phillips"). On 14 July 2005, Deputy Commissioner Phillips entered an opinion and award that concluded, in part:

1. N.C. Gen. Stat. 97-18(b),(c) and Rule 601 require that Defendant-Employer either accept or deny a claim within 14 days of its having actual notice of the claim. N.C. Gen. Stat. 97-18 requires that notice given shall be on a form prescribed by the Commission. . . .
2. Defendant-Carrier filed a Form 60, almost five years later, therefore, Defendant-Carrier has forfeited any right to change the compensation rate paid to Plaintiff. . . .

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Deputy Commissioner Phillips further ordered that “[p]laintiff is entitled to indemnity payments in the amount of \$281.76 per week until further Order of the Commission.” Defendants appealed to the Full Commission.

On 16 February 2006, the Full Commission reviewed the matter. On 16 October 2006, the Full Commission entered an opinion and award that affirmed Deputy Commissioner Phillips’s decision, with modifications. The Commission concluded:

1. N.C. Gen. Stat. §§ 97-18(b), (c) and Rule 601 require that defendants either accept or deny a claim within 14 days of having actual notice of the claim. N.C. Gen. Stat. § 97-18 further requires that notice given shall be on a form prescribed by the Commission. . . .
2. Defendants did not file a Form 60, or otherwise notify the Industrial Commission that plaintiff’s claim was accepted in accordance with N.C. Gen. Stat. § 97-18(b), until approximately five years after receiving notice of plaintiff’s claim. Given defendants’ unreasonable delay in raising an issue regarding plaintiff’s compensation rate, the fact that all pertinent wage records were available to defendants at the time of and all times following plaintiff’s injury, and because it would be unduly burdensome to plaintiff to require her to repay to defendants any amounts of disability compensation that she has been provided through no fault of her own, the Full Commission deems it reasonable to sanction defendants for their failure to adhere to N.C. Gen. Stat. § 97-18(b) pursuant to N.C. Gen. Stat. § 97-18(j). Accordingly, the Full Commission holds that defendants have constructively admitted to plaintiff’s right to compensation pursuant to N.C. Gen. Stat. § 97-18(b) as of their first payment of compensation on July 20, 1999, at a compensation rate of \$281.76 per week.
3. Because defendants constructively admitted to plaintiff’s right to compensation at a compensation rate of \$281.76 per week pursuant to N.C. Gen. Stat. § 97-18(b), that compensation rate constitutes an award of the Industrial Commission pursuant to N.C. Gen. Stat. § 97-87. In accordance with N.C. Gen. Stat. § 97-47, an award of the Industrial Commission may only be modified upon review by the Industrial Commission. It follows that defendants’ unilateral alteration of plaintiff’s compensation rate in February 2004 was contrary to law, and that plaintiff is entitled to disability compensation at a compensation rate of \$281.76 per week

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through at least the effective date of the Deputy Commissioner's Opinion and Award, i.e., July 14, 2005. After July 14, 2005, the compensation rate shall be \$143.17 per week.

4. Because plaintiff has been entitled to compensation at a compensation rate of only \$143.17 per week from July 14, 2005 through the present, it follows that defendants have some overpayment of benefits to plaintiff, and accordingly that defendants are entitled to some credit or deduction for benefits paid to plaintiff to date pursuant to N.C. Gen. Stat. § 97-42. Because defendants improperly reduced plaintiff's rate of compensation payment in February 2004 without first obtaining approval from the Industrial Commission, defendants also owe plaintiff accrued benefits owed but not yet paid.

5. Plaintiff has stipulated to the Amended Form 22 . . . which shows that plaintiff's average weekly wage at the time of her compensable injury was \$214.75, yielding a compensation rate of \$143.17. Accordingly, the Full Commission, upon its own motion and pursuant to N.C. Gen. Stat. § 97-47 and N.C.R. Civ. P., Rule 60, hereby modifies defendants' constructive admission of plaintiff's right to compensation to bring it into accordance with the stipulated facts of record as of July 14, 2005.

Defendants appeal.

II. Issues

Defendants argue the Commission erred by concluding plaintiff is entitled to indemnity payments because: (1) they have overpaid plaintiff and are entitled to a credit; (2) the sanction imposed by the Commission is unreasonable; (3) competent evidence shows their alteration of plaintiff's compensation rate in February 2004 does not entitle plaintiff to a compensation rate of \$281.76 per week through 14 July 2005; (4) their delay in raising the issue of a credit for overpayment of benefits should not result in total forfeiture of the credit; and (5) competent evidence shows it would not be unduly burdensome to plaintiff to allow them to shorten the period during which compensation must be paid.

III. Standard of Review

Our Supreme Court has stated:

[W]hen reviewing Industrial Commission decisions, appellate courts must examine "whether any competent evidence supports

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the Commission's findings of fact and whether [those] findings . . . support the Commission's conclusions of law." The Commission's findings of fact are conclusive on appeal when supported by such competent evidence, "even though there [is] evidence that would support findings to the contrary."

McRae v. Toastmaster, Inc., 358 N.C. 488, 496, 597 S.E.2d 695, 700 (2004) (quoting *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000); *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965)). "The full Commission is the sole judge of the weight and credibility of the evidence[.]" *Deese*, 352 N.C. at 116, 530 S.E.2d at 553.

The Commission's mixed findings of fact and conclusions of law are fully reviewable *de novo* by this Court. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982); *Cauble v. Soft-Play, Inc.*, 124 N.C. App. 526, 528, 477 S.E.2d 678, 679 (1996), *disc. rev. denied*, 345 N.C. 751, 485 S.E.2d 49 (1997).

IV. Entitlement to a Credit

[1] Defendants argue the Commission erred by not granting them a credit for the amount plaintiff had been overpaid pursuant to N.C. Gen. Stat. § 97-42. We disagree.

N.C. Gen. Stat. § 97-42 (2005) provides, in part:

Payments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the terms of this Article were not due and payable when made, *may, subject to the approval of the Commission* be deducted from the amount to be paid as compensation.

(Emphasis supplied).

The statute's use of the words "may, subject to the approval of the Commission" shows the decision to grant an employer credit rests within the Commission's sound discretion and "[t]he decision to grant or deny the credit will not be disturbed in the absence of an abuse of discretion." *Moretz v. Richards & Associates, Inc.*, 74 N.C. App. 72, 75, 327 S.E.2d 290, 293 (1985), *modified on other grounds by*, 316 N.C. 539, 342 S.E.2d 844 (1986).

This Court has stated:

Our Supreme Court held in *Foster v. Western-Electric Co.*, 320 N.C. 113, 115, 357 S.E.2d 670, 672 (1987) that where "defendant

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had not accepted plaintiff's injury as compensable under workers' compensation at the time the payments were made, nor had there been a determination of compensability by the Industrial Commission . . . ,” the employer should be awarded a credit for these payments under N.C.G.S. § 97-42. On the other hand, in cases where it is stipulated that the employer's insurance carrier accepts the employee's claim as compensable under the Act after the injury occurred, *see Moretz v. Richards & Associates*, 316 N.C. 539, 342 S.E.2d 844 (1986), and when the employer stipulates that the employee had sustained an injury by accident arising out of and in the course of his employment, *see Ashe v. Barnes*, 255 N.C. 310, 121 S.E.2d 549 (1961), *a credit will be disallowed under N.C.G.S. § 97-42.*

Lowe v. BE & K Constr. Co., 121 N.C. App. 570, 575-76, 468 S.E.2d 396, 399 (1996) (emphasis supplied).

Here, defendants have stipulated plaintiff's claim was compensable. The Commission properly determined “a credit will be disallowed under N.C.G.S. § 97-42.” *Id.* Defendants have failed to show the Commission abused its discretion by not awarding them a credit for the amount they overpaid plaintiff pursuant to N.C. Gen. Stat. § 97-42, or that its conclusion is affected by an error of law. *Moretz*, 74 N.C. App. at 75, 327 S.E.2d at 293. This assignment of error is overruled.

V. Reasonableness of the Sanction

[2] Defendants argue the Commission erred because the sanction imposed pursuant to N.C. Gen. Stat. § 97-18(j) is unreasonable as a matter of law. We disagree.

N.C. Gen. Stat. § 97-18 (2005) provides, in relevant part:

(a) Compensation under this Article shall be paid periodically, promptly and directly to the person entitled thereto unless otherwise specifically provided.

(b) *When the employer or insurer admits the employee's right to compensation*, the first installment of compensation payable by the employer shall become due on the fourteenth day after the employer has written or actual notice of the injury or death Upon paying the first installment of compensation . . . the insurer shall immediately notify the Commission, on a form prescribed by the Commission, that compensation has begun[.]

. . . .

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(j) The employer or insurer shall promptly investigate each injury reported or known to the employer and at the earliest practicable time shall admit or deny the employee's right to compensation or commence payment of compensation as provided in subsections (b), (c), or (d) of this section. When an employee files a claim for compensation with the Commission, *the Commission may order reasonable sanctions against an employer or insurer which does not*, within 30 days following notice from the Commission of the filing of a claim, or within such reasonable additional time as the Commission may allow, *do one of the following*:

(1) *Notify the Commission and the employee in writing that it is admitting the employee's right to compensation and, if applicable, satisfy the requirements for payment of compensation under subsection (b) of this section.*

(Emphasis supplied). Here, defendants admitted and accepted plaintiff's right to compensation and failed to notify the Commission. Defendants were subject to sanction pursuant to N.C. Gen. Stat. § 97-18(j).

Defendants only contest the amount of the sanction as unreasonable as a matter of law. Defendants assert the Commission imposed an unreasonable \$35,139.26 sanction by not allowing a credit and forcing them to grossly overpay plaintiff from 25 June 1999 to 14 July 2005. This Court reviews the imposition of sanctions by the Commission pursuant to N.C. Gen. Stat. § 97-18 under an abuse of discretion standard. *See Shah v. Howard Johnson*, 140 N.C. App. 58, 65, 535 S.E.2d 577, 582 (2000) (holding the Commission did not act arbitrarily or abuse its discretion in imposing sanctions pursuant to N.C. Gen. Stat. § 97-18 on defendant-employer who unilaterally terminated the benefits of plaintiff-employee).

Here, defendants have failed to show the Commission abused its discretion in imposing the sanction against them. The sole reason the sanction accrued to the amount what defendants portray it to be is through their failure to comply with N.C. Gen. Stat. § 97-18 for approximately five years. Defendants have failed to show any abuse of discretion by the Commission. This assignment of error is overruled.

VI. Compensation From 20 February 2004 through 14 July 2005

[3] Defendants argue the Commission's conclusion of law numbered 3 is contrary to the law and must be reversed. Defendants rea-

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son they were not obligated to apply to the Commission for a modification pursuant to N.C. Gen. Stat. § 97-47 and assert plaintiff had not been “awarded” compensation because neither a Form 60 nor a Form 21 had been filed in this case until 20 February 2004. We disagree.

The Commission concluded:

3. Because defendants constructively admitted to plaintiff’s right to compensation at \$281.76 per week pursuant to N.C. Gen. Stat. § 97-18(b), that compensation rate constitutes an award of the Industrial Commission pursuant to N.C. Gen. Stat. § 97-87. In accordance with N.C. Gen. Stat. § 97-47, an award of the Industrial Commission may only be modified upon review by the Industrial Commission. It follows that defendants’ unilateral alteration of plaintiff’s compensation rate in February 2004 was contrary to law, and that plaintiff is entitled to disability compensation at a compensation rate of \$281.76 per week through at least the effective date of the Deputy Commissioner’s Opinion and Award, i.e., July 14, 2005. After July 14, 2005, the compensation rate shall be \$143.17 per week.

N.C. Gen. Stat. § 97-87(a)(1) (2005) provides an “ ‘award’ includes . . . [a] form filed, *or an award arising, under G.S. 97-18(b)[.]*” (Emphasis supplied). As noted above, defendants admitted plaintiff’s right to compensation in 1999 pursuant to N.C. Gen. Stat. § 97-18(b) when they failed to notify the Commission for nearly five years. The Commission correctly concluded that plaintiff’s right to compensation arose under N.C. Gen. Stat. § 97-18(b) and constituted an award pursuant to N.C. Gen. Stat. § 97-87.

The statutes provide “no basis for altering a final award of compensation, other than that provided by G.S. 97-47.” *Watkins v. Central Motor Lines, Inc.*, 10 N.C. App. 486, 491, 179 S.E.2d 130, 134, *rev’d on other grounds*, 279 N.C. 132, 181 S.E.2d 588 (1971). On 20 February 2004, defendants unilaterally reduced plaintiff’s compensation rate from \$281.76 per week to \$163.76 per week. This reduction occurred without the Commission’s approval and was contrary to N.C. Gen. Stat. § 97-47. The Commission’s conclusion of law numbered 3 is not contrary to the law. This assignment of error is overruled.

VII. Forfeiture of Credit and Recoupment of Credit

[4] Defendants argue their delay in raising the issue of a credit for overpayment of benefits should not result in a total forfeiture of the credit. Defendants also argue competent evidence shows it would not

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be unduly burdensome to plaintiff for the Commission to allow defendants to shorten the period for which compensation must be paid to recoup their credit. As we held above, the Commission did not abuse its discretion by disallowing defendants a credit for the amount plaintiff has been overpaid pursuant to N.C. Gen. Stat. § 97-42. In the absence of any showing of an abuse of discretion or an error of law, this assignment of error is overruled.

VIII. Conclusion

The Commission is charged by statute with administering the workers' compensation laws. Under our standard of review of the Commission's rulings defendants complain of, defendants have failed to show the Commission abused its discretion by not awarding them a credit for the amount they overpaid plaintiff pursuant to N.C. Gen. Stat. § 97-42. Defendants have also failed to show the Commission abused its discretion in imposing the sanction of not allowing a credit for gross overpayments by defendants to plaintiff. The Commission's conclusion of law numbered 3 is not contrary to law. The Commission's opinion and award is affirmed.

Affirmed.

Judge McGEE and Judge ELMORE concur.

STATE OF NORTH CAROLINA v. LAMONT DARRELL CARTER

No. COA06-1645

(Filed 2 October 2007)

1. Robbery— common law—motion to dismiss—sufficiency of evidence—taking property by violence or putting victim in fear—larceny from person

The trial court erred by denying defendant's motion to dismiss the charge of common law robbery, and the case is remanded for a conviction and sentencing on larceny from the person, because: (1) while there was a battery when the victim was sprayed with pepper spray on the back of the head, it did not induce the victim to part with the money nor did the force instill the necessary fear; (2) the State's argument that the victim's lack of resistance proved that he was put in fear was unconvincing

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when the victim's own testimony was that he was instructed not to give chase in the event of a robbery; (3) the record showed no evidence that the money was taken from the victim by the use of violence or putting him in fear; and (4) there was sufficient evidence of larceny from the person when the victim had the money close at hand and was in the middle of replenishing an ATM when the money was removed from his possession.

2. Evidence—prior crimes or bad acts—threats—sending threatening letters—authentication—failure to show prejudice

The trial court did not err in a common law robbery and conspiracy to commit common law robbery case by allowing defendant's alleged coconspirator to testify that defendant and another person had sent him threats, and to read to the jury three threatening letters that he testified he had received while in prison, because: (1) regardless of whether these pieces of evidence were in fact inadmissible, defendant cannot show that without them a different result would likely have been reached; and (2) defendant only argues that the letters are highly prejudicial since the handwriting was not authenticated, which is in fact an argument as to why they are hearsay instead of why they are prejudicial.

3. Constitutional Law—effective assistance of counsel—failure to object—failure to show different result would have been reached

Defendant did not receive ineffective assistance of counsel in a common law robbery and conspiracy to commit common law robbery case based on his trial counsel's failure to object to the mention of his alleged coconspirator having taken a polygraph test, because: (1) defendant failed to object to these statements at trial, and thus review is under the plain error standard; (2) the fact that counsel made an error, even an unreasonable one, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings; and (3) given the very slight nature of these pieces of evidence, defendant cannot show that without them a different result would have been reached.

Appeal by defendant from judgments entered 11 May 2006 by Judge James M. Webb in Guilford County Superior Court. Heard in the Court of Appeals 28 August 2007.

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Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Dorothy Powers, for the State.

Crumpler, Freedman, Parker, & Witt, by Vincent F. Rabil, for defendant-appellant.

HUNTER, Judge.

Lamont Darrell Carter (“defendant”) appeals from the trial court’s entry of judgments based on jury verdicts of guilty of common law robbery and conspiracy to commit common law robbery. After careful review, we vacate the conviction for common law robbery and remand for resentencing on a charge of larceny from the person.

On 20 May 2004, Sean Rowlett (“Rowlett”) and Marvin Cooks (“Cooks”), as Express Teller Services employees, went to Alamance Church Road in Greensboro to replenish an ATM. The ATM was located in an atrium just inside a Bi-Lo grocery store. Upon their arrival at the store, Rowlett exited the truck carrying a canvas bag inside which was a plastic bag containing \$103,000.00 in cash, which he then placed in a grocery cart. He entered the store, approached the ATM, and began the replenishment process, placing the grocery cart with the cash to his left.

Rowlett was “about to insert [his] settlement card” into the ATM to balance the machine when he felt a spray hit the back of his head. Rowlett testified that he “thought it was like a little kid with a water gun[.]” When he touched the back of his head and looked at his hand, however, he discovered that the spray was orange, and the back of his head began to “burn”; he believed it might have been pepper spray or mace. Rowlett then turned to his left, toward where the shopping cart had been, and discovered that the bag containing the money was gone. He looked out the door and saw someone running away with the sack wearing what appeared to be the same uniform he and his partner were wearing. Rowlett had been instructed not to chase after anyone, and so he remained at the store and called the police. Defendant was later apprehended by Greensboro police and charged with both common law robbery and conspiracy to commit common law robbery, the latter based on evidence that defendant and Cooks, Rowlett’s driver, acted in concert to commit the crime.

Cooks testified against defendant at trial. During his testimony, Cooks read to the jury three anonymous threatening letters that he stated he received in jail, testified that he had been threatened, and stated that he had passed a polygraph test regarding these events.

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On 11 May 2006, defendant was convicted by a jury of common law robbery and conspiracy to commit common law robbery, then pled guilty to being an habitual felon. He was sentenced in the presumptive range to 90 to 117 months on the first count and 90 to 117 months on the second count, to run at the expiration of the first sentence. Defendant appeals his conviction for common law robbery.¹

I.

[1] “When ruling on a motion to dismiss, the trial court must determine whether the prosecution has presented ‘substantial evidence of each essential element of the crime.’” *State v. Smith*, 357 N.C. 604, 615, 588 S.E.2d 453, 461 (2003) (quoting *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998), *cert. denied*, 534 U.S. 1046, 151 L. Ed. 2d 548 (2001)). “‘Substantial evidence’ is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion[.]” *State v. Garcia*, 358 N.C. 382, 412, 597 S.E.2d 724, 746 (2004) (internal citation omitted). “‘The reviewing court considers all evidence in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence. Evidentiary “[c]ontradictions and discrepancies are for the jury to resolve and do not warrant dismissal.” ’” *State v. McNeil*, 359 N.C. 800, 804, 617 S.E.2d 271, 274 (2005) (quoting *Garcia*, 358 N.C. at 412-13, 597 S.E.2d at 746) (alteration in original).

Common law robbery “is the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear.” *State v. Stewart*, 255 N.C. 571, 572, 122 S.E.2d 355, 356 (1961). “It is not necessary to prove both violence and putting in fear—proof of *either* is sufficient.” *State v. Moore*, 279 N.C. 455, 458, 183 S.E.2d 546, 547 (1971).

The primary element in dispute here is the final one: Taking the property “by violence or putting [the victim] in fear.” *Stewart*, 255 N.C. at 572, 122 S.E.2d at 356.

Generally the element of force in the offense of robbery may be actual or constructive. Although actual force implies personal violence, the degree of force used is immaterial, *so long as it is sufficient to compel the victim to part with his property or*

1. We note that, while defendant assigned error to various aspects of his conviction for conspiracy to commit common law robbery, he made no arguments as to that conviction to this Court, and as such we deem these assignments of error abandoned. See N.C.R. App. P 28(a).

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property in his possession. On the other hand, under constructive force are included “all demonstrations of force, menaces, and other means by which the person robbed is put in fear sufficient to suspend the free exercise of his will or prevent resistance to the taking . . . [.] No matter how slight the cause creating the fear may be or by what other circumstances the taking may be accomplished, if the transaction is attended with such circumstances of terror, such [as] threatening by word or gesture, as in common experience are likely to create an apprehension of danger and induce a man to part with *his property for the sake of his person*, the victim is put in fear.”

State v. Sawyer, 224 N.C. 61, 65, 29 S.E.2d 34, 37 (1944) (quoting 46 Am. Jur. 146) (emphasis added).

The key distinction here is that, while there clearly was a battery, it did not induce Rowlett to part with the money. The facts as evidenced from Rowlett’s own testimony was that he was sprayed with an unidentifiable substance, felt the back of his head to see what it was, and then turned around to find defendant already running out the door with the money. Certainly, spraying someone with pepper spray, even on the back of the head, is a use of force, but in this instance that force did not instill the fear necessary such that defendant’s obtaining the money could be considered common law robbery.

The State argues to this Court that the above-quoted language means that any time a person’s “resistance to the taking” of property is “prevent[ed],” constructive force—and therefore a common law robbery—has occurred. This meaning only appears when the phrase is taken out of context. The full sentence states: “under constructive force are included ‘all demonstrations of force, menaces, and other means by which the person robbed is put in fear sufficient to [1] suspend the free exercise of his will *or* [2] prevent resistance to the taking[.]’” *Id.* (emphasis added). That is, the person must not only be prevented from resisting; that prevention must be accomplished by putting the person in fear. The State’s argument that Rowlett’s lack of resistance proves that he was put in fear is unconvincing, particularly considering Rowlett’s own testimony that he was instructed not to give chase in the event of a robbery.

Although we must take the facts in the light most favorable to the State here, the record shows no evidence that the money was taken from Rowlett by the use of violence or putting him in fear. However, the remaining elements of common law robbery—that defendant

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took money from the person of another, or in his presence, against his will—together constitute the crime of larceny from the person.

As our Supreme Court has stated, “larceny from the person differs from robbery in that larceny from the person lacks the requirement that the victim be put in fear.” *State v. Buckom*, 328 N.C. 313, 317, 401 S.E.2d 362, 365 (1991). Defendant also argues to this Court that, because the money involved was in a cart to Rowlett’s side, it was not taken from his person or presence as required for a conviction of common law robbery. The requirement for the crime of larceny from the person is slightly different, so we consider defendant’s argument on this point here.

For the crime of larceny from the person, the property must be taken “‘from one’s presence and control[,]” which our Supreme Court has stated means “the property stolen must be in the immediate presence of and under the protection or control of the victim at the time the property is taken.” *State v. Barnes*, 345 N.C. 146, 149, 478 S.E.2d 188, 190 (1996) (emphasis omitted) (quoting *Buckom*, 328 N.C. at 317-18, 401 S.E.2d at 365). As this explanation suggests, our courts’ holdings as to when larceny from the person has been committed have concentrated on the physical proximity of the victim to the property when it was taken. See *Buckom*, 328 N.C. at 318, 401 S.E.2d at 365 (defendant’s taking money from cash register when cashier was standing in front of register making change constituted larceny from the person); *State v. Wilson*, 154 N.C. App. 686, 689-91, 573 S.E.2d 193, 195-97 (2002) (same); *State v. Pickard*, 143 N.C. App. 485, 491, 547 S.E.2d 102, 106-07 (2001) (finding evidence that defendant snatched victim’s purse off her arm while standing behind her sufficient to support conviction for larceny from the person); *Barnes*, 345 N.C. at 148-50, 478 S.E.2d at 189-90 (where employee in charge of bank bag left it under cash register and was in kiosk twenty-five feet away, bag was no longer in his presence or control for purposes of larceny from the person); *State v. Lee*, 88 N.C. App. 478, 478-79, 363 S.E.2d 656, 656 (1988) (theft of purse not larceny from the person where purse was left in grocery cart and stolen while owner walked away for four or five minutes).

In the case at hand, Rowlett had the money close at hand and was in the middle of the replenishment transaction with the ATM when the money was removed from his possession. Further, although the money does not appear from the record to have been in Rowlett’s line of sight, as we noted in *Barnes*, “if a man carrying a heavy suitcase sets it down for a moment to rest, and remains right there to guard it,

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the suitcase remains under the protection of his person.” *Barnes*, 345 N.C. at 148, 478 S.E.2d at 190 (quoting Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 342-43 (3d ed. 1982)).

Thus, we find substantial evidence was presented for all the elements of larceny from the person, and as such remand this case for sentencing on that basis.

II.

[2] At trial, Cooks, defendant’s alleged co-conspirator, was allowed to testify that defendant and another person had “sent [him] threats” and to read to the jury three threatening letters that he testified he had received while in prison. Defendant argues that both pieces of testimony were improperly admitted; specifically, that Cooks’s testimony as to threats he received was unduly prejudicial, and that the letters were not properly authenticated before being read to the jury. Both of these arguments are without merit.

We first note that defendant has the burden to show not only that the evidence was admitted in error, but also that the error was prejudicial. That is, a defendant must show that, but for the error, a different result would likely have been reached. *State v. Freeman*, 313 N.C. 539, 548, 330 S.E.2d 465, 473 (1985).

Cooks’s statement regarding the threats came in the context of his testimony about defendant and another person coming to his house to urge him to commit certain crimes with them. Cooks stated: “[H]e—they sent threats, and they said that I needed to help them or, you know, something was going to happen to me if I didn’t.” He also testified that he “didn’t want to participate[,]” but the pair “kept pushing and urging.” Defendant argues that this testimony exaggerated his propensity for violence, and thus “its probative value is substantially outweighed by the danger of unfair prejudice” and so should have been excluded. N.C. Gen. Stat. § 8C-1, Rule 403 (2005).

The letters Cooks was allowed to read to the jury urged him not to testify and explained at length how, if Cooks did not testify against his co-conspirators, he would not serve any further jail time. Only one of the three was signed; it stated it was from “Two Guns,” which Cooks stated he understood to mean defendant, having heard defendant refer to himself that way in the past. Defendant argues that, because the trial court allowed the letters to be read without authenticating their handwriting, they were hearsay and thus inadmissible.

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Regardless of whether these pieces of evidence were in fact inadmissible, however, defendant cannot show that without them a different result would likely have been reached. As to the testimony regarding the threats, the statements specified in defendant's assignments of error (quoted above) are just two sentences of Cooks's testimony as to defendant's threatening behavior, the whole of which covers several pages of the record. The removal of these two sentences would have no discernable effect on the thrust of Cooks's testimony as to defendant's threats. As to the letters, defendant only argues that they are highly prejudicial because the handwriting was not authenticated, which is in fact an argument as to why they are *hearsay*, not why they are *prejudicial*.

Defendant cannot show why the exclusion of this evidence would have led to a different result at trial, and as such, this assignment of error is overruled.

III.

[3] Finally, defendant argues that his counsel's failure to object to the mention of Cooks's having taken a polygraph test constituted ineffective assistance of counsel. This argument is without merit.

The fact that Cooks had taken a polygraph test came up three times during the trial: Twice during Cooks's own testimony, and once during the testimony of Detective Jackie Taylor of the Raleigh Police Department. Defense counsel did not object at any of these times. When Cooks read the above-mentioned letters to the jury, one letter contained the following statement: "I fully explained to him how the police threatened you with a murder charge if you didn't tell them what they wanted to hear, even though you passed a polygraph test." Next, during defense counsel's cross-examination of Cooks, she asked: "Did you tell the police officers that you had to go about four weeks ago and take a polygraph?" This was repeated twice after the State objected and the court overruled it before Cooks answered; he then answered "[y]es" and defense counsel moved on to what else Cooks had told the police. Finally, during Detective Taylor's testimony, defense counsel read aloud a portion of the detective's report summarizing what Cooks had told them: "I had to go about four weeks ago and take a polygraph at the police department."

Defense counsel's failure to object to these statements at trial means that this Court reviews defendant's arguments under a plain error standard. *See State v. Mitchell*, 328 N.C. 705, 711, 403 S.E.2d 287, 290 (1991). However, "[t]he fact that counsel made an error, even an

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unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 248 (1985). Again, given the very slight nature of these pieces of evidence, defendant cannot show that without them a different result would have been reached. As such, this assignment of error is overruled.

IV.

We find no prejudicial error resulted from the admission of the letters, testimony of threats, or evidence of Cooks's polygraph test. However, because the State did not present evidence of all the elements of common law robbery but did present evidence of all the elements of larceny from the person, we vacate the verdict on common law robbery and remand to the trial court for resentencing based on a charge of larceny from the person.

Vacated and remanded.

Judges WYNN and BRYANT concur.

STATE OF NORTH CAROLINA v. TREVOR DEMON HALL, DEFENDANT

No. COA07-335

(Filed 2 October 2007)

1. Discovery— expert testimony—physician assistant—fact witness—protection from unfair surprise

The trial court in a common law robbery case did not improperly allow the State to adduce expert testimony from a physician assistant without complying with the discovery requirements for expert witnesses under N.C.G.S. § 15A-903(a)(2), because: (1) although the physician assistant apprised the jury of his diagnosis of the victim's muscle tenderness, an opinion informed by his specialized training and experience, he offered no opinion and brought no expertise to bear as to the subject at hand at defendant's trial; (2) the physician assistant was properly treated as a fact witness for discovery purposes since his opinion as a physician assistant was not germane to the issue before the jury when

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neither the fact nor the degree of the victim's injuries was essential to the State's case; and (3) the purpose of discovery is to protect defendant from unfair surprise, and the State provided the defense with records of the victim's appointment with the physician assistant detailing her diagnosis and treatment.

2. Discovery—expert testimony—detective—act of collecting latent fingerprints from surface—fact witness

The trial court in a common law robbery case did not improperly allow the State to adduce expert testimony from a detective without complying with the discovery requirements for expert witnesses under N.C.G.S. § 15A-903(a)(2), because: (1) our Supreme Court has already held that a witness does not give expert testimony in merely describing the act of collecting latent fingerprints from a surface; and (2) the detective was properly treated as a fact witness for discovery purposes when he did not purport to compare defendant's fingerprints with the latent prints, made no attempt to express an opinion, and was asked no questions requiring him to do so.

Appeal by defendant from judgment dated 24 July 2006 by Judge William C. Gore, Jr., in Columbus County Superior Court. Heard in the Court of Appeals 24 September 2007.

Attorney General Roy Cooper, by Assistant Attorney General Charles E. Reece, for the State.

Thorsen Law Office, by Haakon Thorsen, for defendant-appellant.

BRYANT, Judge.

Trevor Demon Hall (defendant) appeals from a judgment dated 24 July 2006, and entered upon his conviction for the offense of common law robbery. For the reasons stated herein, we find defendant received a fair trial, free from error.

Facts

Complainant Robin Compos testified that on the afternoon of 1 November 2005, she went to visit her friend, Cathy Starling, who was at home recovering from surgery. Compos planned to drive Starling to the bank so that she could cash her check and pay her rent. When Compos arrived at the residence, she found two men and a woman with Starling. Compos recognized one of the men as "Turbo[,]” who

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was attempting to collect a debt from Starling. With Turbo were defendant and a woman, neither of whom Compos knew.

Compos drove Starling to a BB&T bank in Riegelwood, North Carolina, where Starling cashed her check. Turbo and his associates followed them in a second car. After paying her rent at a nearby credit union, Starling got into an argument with Turbo. She then returned to the car and handed Compos the bank envelope containing the remainder of the proceeds of her check.

Upon returning to Starling's house, Turbo and the unknown woman joined Starling in a bedroom, while defendant and Compos waited in the living room. Defendant walked out of the living room briefly, whereupon his two associates emerged from the bedroom and exited the house. When defendant came back to the living room, Compos "told him that his ride had just left him." In defendant's presence, Starling asked Compos for the bank envelope and removed some of the money. Starling then gave the envelope back to Compos and told her to "hold it for her." Compos put the envelope in her left front pants' pocket. Starling went into the bathroom.

Visibly upset by his predicament, defendant forced open the bathroom door and yelled at Starling. Compos threatened to call the police and told defendant that she would "take him wherever he's needing to go" if he left Starling alone. Compos and defendant got into her car and drove for approximately three miles toward Whiteville, North Carolina. After directing Compos into a driveway, defendant put the car's gear shift into park, "started beating [her] in the head and started saying, 'Give me the money, give me the money.'" As Compos tried to protect herself, defendant ripped the side of her pants and took the envelope from her pocket. He then "calmly got out of the car and walked off."

Compos drove to the home of her former co-worker and called 911. When police arrived, she told them about the robbery and provided a description of her assailant. The next morning, she sought treatment at the Riegelwood Medical Clinic for blurred vision in her right eye and "[s]harp, throbbing pains going through the side of [her] temple, and into [her] eye." The doctor found that she had "muscular swelling in that eye" and temple and prescribed "some really strong medication for the pain[.]"

Three or four days after the robbery, a detective showed Compos an array of photographs and asked if she could identify her assailant.

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Compos selected defendant's photograph as depicting the man who assaulted her and stole Starling's money from her pocket on 1 November 2005. Compos also identified defendant in court as the robber.

Daniel Boyes, a physician's assistant, examined Compos at Riegelwood Medical Clinic on the morning of 2 November 2005. Compos told Boyes "that she had been assaulted, struck multiple times . . . in the right temporal region[,] and "complained of a headache, blurred vision, tenderness to the scalp and neck pain." Over defendant's objection, Boyes testified that his examination of Compos revealed "some swelling and tenderness to the right side of her head" as well as "exquisit[e]" tenderness in the musculature of the left side of her neck.

Columbus County Sheriff's Detective Adam Coleman testified that he spoke to Compos on the afternoon of 1 November 2005. She was "very upset" and "having problems breathing[,] and told him she had been robbed of money while giving her assailant a ride in her car after visiting a friend's house. Compos reported that her assailant hit her in the face and head and ripped her pants pocket while sitting in the front passenger seat of her car. Over defendant's objection, Coleman also testified that he dusted the front passenger's side door of Compos' car for fingerprints and successfully lifted four latent prints. He learned how to lift latent prints as part of his Basic Law Enforcement Training Program, and had performed the activity "a lot" since becoming a deputy in 2003.

Detective Mack Brazelle and Latent Print Examiner Angela Berry of the Columbus County Sheriff's Office testified as experts in fingerprint identification. After comparing defendant's fingerprints with the latent print lifted from the passenger's side door of Compos' car, both experts averred that the latent print found on the car belonged to defendant. Brazelle found "no possibility" that the latent print belonged to anyone other than defendant; and Berry was "[one] hundred percent confident" in her identification. Brazelle also confirmed that Compos selected defendant's photograph from a lineup he showed her on 3 November 2005.

[1] On appeal, defendant claims the trial court erred by allowing the State to adduce expert testimony from physician's assistant Boyes and Detective Coleman without complying with the discovery requirements for expert witnesses set forth in N.C. Gen. Stat. § 15A-903(a)(2) (2005). Relying on our holding in *State v.*

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Blankenship, 178 N.C. App. 351, 631 S.E.2d 208 (2006), he faults the court for allowing Boyes to testify regarding his medical training and experience and his diagnosis of Compos' condition on the morning of 2 November 2005. Similarly, defendant notes that the court allowed Agent Coleman to testify about his training and the methodology he employed in lifting the latent prints from Compos' car. Because neither Boyes nor Coleman were designated as expert witnesses in the State's discovery materials, in accordance with N.C. Gen. Stat. § 15A-903(a)(2), defendant asserts that he "must receive a new trial." We disagree.

Standard of Review

"The determination of whether a witness' testimony constitutes expert testimony is one within the trial court's discretion, and will not be reversed on appeal absent an abuse of discretion." *Blankenship*, 178 N.C. App. at 354-55, 631 S.E.2d at 211 (citing *State v. Morgan*, 359 N.C. 131, 160, 604 S.E.2d 886, 904 (2004), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 79 (2005)).

I

Rule 702(a) of the North Carolina Rules of Evidence provides that "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion." N.C. Gen. Stat. § 8C-1, Rule 702(a) (2005). By contrast, a lay witness may offer an opinion only where it is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2005).

Having agreed to engage in reciprocal voluntary discovery as contemplated by N.C. Gen. Stat. § 15A-902, the State was obliged to undertake the following disclosures regarding its expert witnesses:

Give notice to the defendant of any expert witnesses that the State reasonably expects to call as a witness at trial. Each such witness shall prepare, and the State shall furnish to the defendant, a report of the results of any examinations or tests conducted by the expert. The State shall also furnish to the defendant the expert's curriculum vitae, the expert's opinion, and the underlying basis for that opinion. The State shall give the notice and fur-

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nish the materials required by this subsection within a reasonable time prior to trial, as specified by the court.

N.C. Gen. Stat. § 15A-903(a)(2) (2005). In order to qualify as an expert, a witness need only be found “better qualified than the jury as to the subject at hand, with the testimony being ‘helpful’ to the jury.” *State v. Davis*, 106 N.C. App. 596, 601, 418 S.E.2d 263, 267 (1992) (citing *State v. Huang*, 99 N.C. App. 658, 663, 394 S.E.2d 279, 282, *disc. review denied*, 327 N.C. 639, 399 S.E.2d 127 (1990)), *disc. review denied*, 333 N.C. 347, 426 S.E.2d 710 (1993).

In *Blankenship*, the defendant was charged with possession of precursor chemicals after police found boxes of matches and Sudafed and bottles of iodine, hydrogen peroxide, and rubbing alcohol in the bed of his pickup truck. *Blankenship*, 178 N.C. App. at 352, 631 S.E.2d at 209. At trial, “the State proffered testimony by State Bureau of Investigation Special Agent Kenneth Razzo (“Agent Razzo”) as to the manufacturing process of methamphetamine and the ingredients used.” *Id.* The defendant objected to Agent Razzo’s testimony based on the State’s failure to provide notice and other discovery required for an expert witness under N.C. Gen. Stat. § 15A-903(a)(2). *Id.* at 353, 631 S.E.2d at 209. The trial court overruled the objection, concluding “that since Agent Razzo would not be giving his opinion as to the specific facts of defendant’s case, and he had not performed any tests or examinations on any of the evidence in the case, he would be permitted to testify as a fact witness.” *Id.* at 355, 631 S.E.2d at 211.

On appeal, we held the trial court abused its discretion by treating Agent Razzo as a fact witness rather than an expert. *Id.* at 356, 631 S.E.2d at 211. In reaching this conclusion, we assessed both the specialized nature of Agent Razzo’s testimony and the nexus between his field of expertise and the issue before the jury, as follows:

Although the trial court permitted Agent Razzo to testify as a so-called lay witness, we hold that he in fact qualified as, and testified as, an expert witness. The jury was permitted to hear testimony about his extensive training and experience in the process of manufacturing methamphetamine and clandestine laboratory investigations, along with his specialized knowledge of the manufacturing process of methamphetamine. Also, the State specifically tendered Agent Razzo as an expert witness, and the trial court failed to take any action to remedy the State’s attempt to tender Agent Razzo as an expert. We hold that based on the presentation of evidence concerning Agent Razzo’s extensive

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training and experience, he was “better qualified than the jury as to the subject at hand,” and he testified as an expert witness.

Id. (citing *Davis*, 106 N.C. App. at 601, 418 S.E.2d at 267). Because the State had not provided defendant with the required discovery related to its expert witness under N.C. Gen. Stat. § 15A-903(a)(2), we awarded defendant a new trial. *Id.* at 356, 631 S.E.2d at 212.

Here, in overruling defendant’s *Blankenship* objection to Boyes’ testimony, the trial court found that he was testifying as a fact witness for purposes of N.C. Gen. Stat. § 15A-903(a), notwithstanding his expertise as a physician’s assistant. We agree. Although Boyes apprised the jury of his diagnosis of Compos’ muscle tenderness—an opinion informed by his specialized training and experience—he offered no opinion and brought no expertise to bear “as to the subject at hand” at defendant’s trial. *Davis*, 106 N.C. App. at 601, 418 S.E.2d at 267. Unlike Agent Razzo, whose specialized knowledge helped the jury to identify the materials found in the Blankenship’s truck as precursors to methamphetamine, Boyes’ opinion as a physician’s assistant was not germane to the issue before the jury. Therefore, the trial court did not abuse its discretion in treating Boyes as a fact witness for discovery purposes. *See, e.g., Turner v. Duke Univ.*, 325 N.C. 152, 167-68, 381 S.E.2d 706, 715-16 (1989) (distinguishing between a physician testifying as a fact witness and as an expert witness for purposes of discovery under N.C. R. Civ. P. 26(b)(4)).

Further, we find no abuse of discretion by the trial court under the particular facts of this case. The offense of common law robbery does not require the application of actual force or the infliction of injury upon the victim. *State v. Wilson*, 26 N.C. App. 188, 190, 215 S.E.2d 167, 168 (1975). Accordingly, neither the fact nor the degree of Compos’ injuries was essential to the State’s case. Moreover, Boyes offered no opinion regarding the etiology of Compos’ symptoms, or of the consistency between her injuries and her account of the robbery. Rather, his testimony served primarily to corroborate Compos’ claim that she obtained medical treatment on 2 November 2005. Even if the court had excluded Boyes’ opinion testimony, he would have been free to offer factual testimony confirming his treatment of Compos on 2 November 2005, corroborating her statements to him, and stating the treatment he prescribed for her. Finally, we note that “[t]he purpose of discovery under our statutes is to protect the defendant from unfair surprise by the introduction of evidence he cannot anticipate.” *Blankenship*, 178 N.C. App. at 354, 631 S.E.2d at 210 (citation and quotations omitted). The record reflects that the State provided the

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defense with records of Compos' appointment with Boyes at Reigelwood Medical Clinic on 2 November 2005, detailing her diagnosis and treatment. This assignment of error is overruled.

II

[2] Defendant raised a similar objection to Deputy Coleman's testimony about his lifting of the latent fingerprints from Compos' car. Citing *Blankenship*, defendant averred that the State failed to designate or qualify Deputy Coleman as an expert witness, or to provide the defense with Coleman's *curriculum vitae* pursuant to N.C. Gen. Stat. § 15A-903(a)(2). The trial court overruled defendant's objection, finding that Deputy Coleman "was a fact witness and that he entered no expert opinions requiring him—requiring the State to provide a [*curriculum vitae*] pursuant to *State v.*] *Blankenship*."

We again find no abuse of discretion by the trial court. Our Supreme Court has held that a witness does not give expert testimony in merely describing the act of collecting latent fingerprints from a surface:

Admittedly, a person who lifts latent prints must know how to perform that procedure. But this does not mean he must be qualified as an "expert." The basic reason for qualifying a witness as an expert is to insure that he is better qualified than the jury to form an opinion and draw appropriate inferences from a given set of facts.

State v. Shore, 285 N.C. 328, 340, 204 S.E.2d 682, 690 (1974) (citation omitted); see also *State v. Caddell*, 287 N.C. 266, 277, 215 S.E.2d 348, 355 (1975). Inasmuch as Deputy Coleman did not purport to compare defendant's fingerprints with the latent prints, "made no attempt to express an opinion and was asked no questions requiring him to do so[.]" he was properly treated as a fact witness for discovery purposes. *Shore*, 285 N.C. at 340, 204 S.E.2d at 690. We note that the State provided the defense with proper discovery regarding its two expert fingerprint analysts, Brazelle and Berry.

The record on appeal includes two additional assignments of error which are not addressed by defendant in his brief to this Court. By Rule, we deem them abandoned. N.C. R. App. P. 28(b)(6).

No error.

Judges WYNN and ELMORE concur.

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STATE OF NORTH CAROLINA v. SHANNON DENISE HAISLIP

No. COA06-1488

(Filed 2 October 2007)

**Constitutional Law; Motor Vehicles— driving while impaired—
standing to challenge constitutionality of checkpoint plan**

The trial court erred in a driving while impaired case by concluding that defendant did not have standing to challenge the constitutionality of a motor vehicle checkpoint plan, and the case is remanded for findings and conclusions on the checkpoint's constitutionality, because: (1) an officer seized defendant within the meaning of the Fourth Amendment when she stopped walking toward an apartment in response to the officer's presence and request, and a reasonable person at 2:30 a.m. would not feel free to leave upon being approached by a uniformed officer whose patrol car's blue lights were activated behind him; (2) the officer testified that he stopped defendant under the systematic checkpoint plan to conduct investigatory stops of anyone who turned to avoid the checkpoint, and not in light of and pursuant to the totality of the circumstances; and (3) the trial court's finding that defendant was not stopped by the checkpoint was not supported by the evidence.

Appeal by Defendant from judgment entered 23 May 2006 by Judge William C. Griffin, Jr., in Pitt County Superior Court. Heard in the Court of Appeals 6 June 2007.

Attorney General Roy Cooper, by Special Deputy Attorney General Neil Dalton, for the State.

The Robinson Law Firm, P.A., by Leslie S. Robinson, for Defendant.

STEPHENS, Judge.

On 3 February 2005, Defendant was issued a citation for driving while impaired in violation of N.C. Gen. Stat. § 20-138.1. After being found guilty of that offense in district court on 13 February 2006, Defendant appealed her conviction to the superior court pursuant to N.C. Gen. Stat. § 7A-271(b). On 28 February 2006, Defendant filed a motion to suppress the evidence used to convict her. At a hearing on the motion held outside the presence of the jury during trial on 22

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May 2006, Defendant argued that the evidence used to convict her was procured as the result of an unconstitutional motor vehicle checkpoint. The trial court concluded that Defendant did not have standing to challenge the checkpoint's constitutionality because she was not "snared" by it. Defendant was subsequently found guilty by the jury. Defendant appeals.

The dispositive issue before this Court is whether Defendant has standing to challenge the constitutionality of the checkpoint plan. The trial court tailored its ruling so that "[this] Court can't duck this question[.]" We reverse the order and judgment of the trial court and remand for findings and conclusions on the checkpoint's constitutionality.

FACTS

On the evening of 2 February 2005, a weeknight, patrol officers Lascallette ("Lascallette") and Webb ("Webb") of the Greenville Police Department "discussed the possibility" of setting up a "driver's license checkpoint" later that night. Although Lascallette testified that Webb received authority from Lieutenant Phipps ("Phipps"), their supervisor, to conduct a checkpoint, Phipps testified that he could not recall giving authorization for the checkpoint.

Lascallette and Webb decided to meet at a location on Firetower Road in Greenville around 2:30 a.m. because they "don't get many calls at that time[.]" Lascallette testified that the officers had conducted previous checkpoints at the Firetower Road location and that he "didn't think it was a very effective spot, but it served the purpose—it kept us gainfully employed." Although Lascallette labeled the checkpoint a "driver's license checkpoint," he acknowledged that the purpose of the checkpoint was to look for "[a]ny violation of [Chapter 20]" of North Carolina's General Statutes, which governs motor vehicle offenses in this state. Lascallette further testified that it was within the officers' discretion to determine the methodology by which the checkpoint was conducted at the scene. Though neither Lascallette nor Phipps could testify as to how, in fact, the Firetower Road checkpoint was conducted, both offered testimony as to how such checkpoints were usually conducted.

Lascallette and Webb met on Firetower Road that night as planned. They were joined by patrol officer Oxendine ("Oxendine"). Lascallette acknowledged that since all three officers were patrol officers, no particular person was "in charge" of the checkpoint. Where they met, Firetower is a three-lane road with an eastbound

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lane, a westbound lane, and a center turn lane. Webb and Oxendine positioned their patrol cars back to back in the center turn lane, activated their patrol cars' blue lights and headlamps, and placed flares on the road in front of their cars. No signs were erected to indicate that a checkpoint was in progress. Lascalette estimated that a vehicle approaching from the east could see the patrol cars from three-quarters of a mile away. Lascalette decided to position his car as a "chase vehicle" that would conduct "investigatory stop[s]" of "anyone who turned around on [Webb and Oxendine][.]" Lascalette testified that the use of a chase vehicle was standard operating procedure. Accordingly, Lascalette parked his car facing north toward Firetower on Dudley's Grant Drive, a road intersecting Firetower four to five hundred yards to the east and with a clear view of the checkpoint's roadblock.

Within minutes of positioning himself on Dudley's Grant, Lascalette observed Defendant's car heading west on Firetower approaching the roadblock. As Defendant approached Dudley's Grant, she "slowed abruptly," and, without signaling, turned south onto Dudley's Grant from the westbound lane of traffic "crossing the turn lane." Lascalette "fell in behind" Defendant and activated his blue lights. Defendant parked in front of the second or third apartment building on the left side of Dudley's Grant, exited the vehicle, and walked toward one of the apartments. Lascalette parked his car with his blue lights flashing, approached Defendant, and said "excuse me." Defendant then stopped walking toward the apartment and turned toward Lascalette. Lascalette testified that Defendant's driving and her exit from the car were not "all [that] out of the ordinary[.]" and that he had stopped her because "she was avoiding a checkpoint." Noticing that Defendant was wearing pajamas and smelled of alcohol, Lascalette asked Defendant if she had been drinking. Defendant admitted that she had been drinking, and Lascalette asked her to participate in field sobriety tests.

Defendant immediately requested a pre-arrest test. In response, Lascalette told Defendant he "wasn't sure [he] even wanted to pursue charges" and "asked her if she wanted to take the field sobriety tests [so that he] could decide what [he] wanted to do with her[.]" Defendant then submitted to the field sobriety tests. After administering the tests, Lascalette explained the pre-arrest test procedures and asked Defendant if she still wanted a pre-arrest test. Defendant answered in the affirmative and was voluntarily transported by Lascalette to the Pitt County Detention Center. An Intoxilyzer 5000's

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analysis of Defendant's breath revealed that Defendant had a blood alcohol concentration of twelve one-hundredths grams of alcohol per 210 liters of breath (.12). Thereafter, Lascalette issued Defendant a citation for driving while impaired.

ANALYSIS

Defendant first argues that the trial court erred in concluding that she does not have standing to challenge the checkpoint's constitutionality. We agree.

"Our review of a denial of a motion to suppress by the trial court is 'limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.'" *State v. Barden*, 356 N.C. 316, 340, 572 S.E.2d 108, 125 (2002) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003). According to the trial transcript, Judge Griffin made findings of fact and conclusions of law in a written order denying Defendant's motion to suppress. No such order appears in the record on appeal.¹ Thus, our review is limited to whether Judge Griffin's finding of fact, announced from the bench, that Defendant was not stopped by the checkpoint is supported by competent evidence and, if so, whether that finding supports his conclusion of law that Defendant does not have standing to challenge the checkpoint's constitutionality.

We first address the State's contention that Defendant was "*never* 'stopped.'" (Emphasis added.) The Fourth Amendment of the United States Constitution "prohibits 'unreasonable searches and seizures' by the Government, and its protections extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest." *United States v. Arvizu*, 534 U.S. 266, 273, 151 L. Ed. 2d 740, 749 (2002). Accordingly, in order to prevail on a motion to suppress, a defendant must first establish that she was "stopped" within the meaning of the Fourth Amendment. *See United States v. Mendenhall*, 446 U.S. 544, 64 L. Ed. 2d 497, *reh'g denied*, 448 U.S. 908, 65 L. Ed. 2d 1138 (1980). A stop does not occur "simply because a police officer approaches an individual and asks a few questions." *Florida v. Bostick*, 501 U.S. 429, 434, 115 L. Ed. 2d 389, 398 (1991). A stop occurs when, given the totality of the circumstances, a reasonable per-

1. Likewise, no such order appears in the trial court's file, according to the Pitt County Clerk of Superior Court's office.

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son would not feel free to leave. *Mendenhall*, *supra*; *California v. Hodari D.*, 499 U.S. 621, 113 L. Ed. 2d 690 (1991); *State v. Campbell*, 359 N.C. 644, 617 S.E.2d 1 (2005), *cert. denied*, 547 U.S. 1073, 164 L. Ed. 2d 523 (2006).

In this case, Lascallette seized Defendant within the meaning of the Fourth Amendment. Lascallette “fell in behind” Defendant’s vehicle and activated his blue lights as soon as she turned down Dudley’s Grant. Defendant either ignored or did not see Lascallette’s vehicle behind her, parked, and exited her car. As she was walking away, Lascallette approached her and got her attention. Lascallette’s blue lights were still activated when Defendant turned toward him. A reasonable person, at 2:30 in the morning, would not feel free to leave upon being approached as Defendant was by a uniformed officer whose patrol car’s blue lights were activated behind him. Defendant submitted to Lascallette’s show of authority. We thus conclude that Defendant was seized within the meaning of the Fourth Amendment when she stopped walking toward the apartment in response to Lascallette’s presence and request.

We next address Defendant’s standing to challenge the constitutionality of the stop. In *State v. Foreman*, 351 N.C. 627, 527 S.E.2d 921 (2000), our Supreme Court reaffirmed the long-standing rule that “[w]hen an officer observes conduct which leads him reasonably to believe that criminal conduct may be afoot, he may stop the suspicious person to make reasonable inquiries.” *Id.* at 630, 527 S.E.2d at 923 (quoting *State v. Pearson*, 348 N.C. 272, 275, 498 S.E.2d 599, 600 (1998)). “[T]he police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion.” *State v. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 779 (quoting *Terry v. Ohio*, 392 U.S. 1, 21, 20 L. Ed. 2d 889, 906 (1968)), *cert. denied*, 444 U.S. 907, 62 L. Ed. 2d 143 (1979)). Where police officers conduct motor vehicle checkpoints,

it is reasonable and permissible for an officer to monitor a checkpoint’s entrance for vehicles whose drivers may be attempting to avoid the checkpoint, and it necessarily follows that an officer, in light of and pursuant to the totality of the circumstances or the checkpoint plan, may pursue and stop a vehicle which has turned away from a checkpoint within its perimeters for reasonable inquiry to determine why the vehicle turned away.

Foreman, 351 N.C. at 632-33, 527 S.E.2d at 924.

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In this case, according to his undisputed testimony, Lascalette stopped Defendant “pursuant to . . . the checkpoint plan,” not “in light of and pursuant to the totality of the circumstances[.]” *Id.* Lascalette testified that his job as the checkpoint’s chase vehicle officer was to conduct “investigatory stop[s]” of “*anyone* who turned around on [Officers Webb and Oxendine]” (emphasis added), and that he only stopped Defendant because “she was avoiding a checkpoint.”¹ Lascalette pointed to no “specific and articulable facts” other than Defendant’s turn down Dudley’s Grant that warranted his stop. He did not stop her because she turned across the center turn lane, because of how she drove down Dudley’s Grant, or because of the manner in which she exited her vehicle. He stopped her based on the systematic plan of the checkpoint. It necessarily follows, and we so hold, that when a defendant is stopped pursuant to a checkpoint plan, a defendant has standing to challenge the constitutionality of the plan by which she was “snared.”

We disagree with the State’s contention that our Supreme Court held in *State v. Mitchell*, 358 N.C. 63, 592 S.E.2d 543 (2004), “that it is error to analyze the stop and arrest of someone eluding a checkpoint in terms of the legality of the checkpoint.” The defendant in *Mitchell* sped up as he approached a checkpoint’s roadblock and drove through the roadblock, causing a police officer to jump out of the road to avoid being hit. The officer pursued and stopped the defendant a mile and a half down the road. The Supreme Court held *in the alternative* that (1) the defendant was stopped pursuant to a constitutional checkpoint, and (2) the officer had reasonable, articulable suspicion to stop the defendant. *Id.* Our holding in this case is consistent with the Supreme Court’s analysis in *Mitchell*.

The trial court’s finding that Defendant was not stopped by the checkpoint is not supported by the evidence. The trial court thus erred in ruling that Defendant did not have standing to challenge the constitutionality of the checkpoint plan. Accordingly, the order denying Defendant’s motion to suppress is reversed. Because the trial court did not rule on the constitutionality of the checkpoint, the judgment entered upon the jury’s verdict must be reversed. The case is remanded to the trial court for appropriate findings of fact and con-

2. We are not convinced that Defendant did, in fact, turn down Dudley’s Grant to avoid the checkpoint. We note that Defendant made her left turn onto Dudley’s Grant at least 400 yards before the checkpoint’s roadblock. At that distance, and in the absence of posted signs indicating that a checkpoint was ahead, we question whether Defendant was avoiding the checkpoint.

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clusions of law on the constitutionality of the checkpoint and for entry of an order or judgment consistent with such ruling.

REVERSED AND REMANDED.

Judges McGEE and SMITH concur.

STATE OF NORTH CAROLINA v. KENDRICK DONTA COLSON

No. COA07-107

(Filed 2 October 2007)

1. Constitutional Law— right to counsel and right to testify— entitlement to both

Forcing defendant to choose between testifying or relinquishing his right to be represented by counsel constituted constitutional error in an armed robbery prosecution where the counsel was of the opinion that defendant's testimony would be false and the judge told defendant that he could proceed pro se if he insisted on testifying. Defendant is entitled both to testify in his own behalf and to his right to counsel.

2. Sentencing— prior record level—prior probationary status—determination by jury required

In a case remanded on other grounds, the trial court must submit defendant's prior probationary status to the jury for proof beyond a reasonable doubt, unless it is admitted by defendant, in order to use that status to enhance defendant's prior record level for the purpose of sentencing.

Appeal by defendant from judgment entered 1 October 2003 by Judge Michael E. Beale in Anson County Superior Court. Heard in the Court of Appeals 12 September 2007.

Attorney General Roy Cooper, by Assistant Attorney General Daniel P. O'Brien, for the State.

Haral E. Carlin, for defendant-appellant.

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TYSON, Judge.

This Court granted Kendrick Donta Colson's ("defendant") petition for writ of *certiorari* to review judgment entered after a jury found him to be guilty of robbery with a dangerous weapon pursuant to N.C. Gen. Stat. § 14-87. We hold that defendant is entitled to a new trial.

I. Background

The State's evidence tended to show that on 19 January 2003, defendant and an accomplice allegedly entered into a convenience store, pointed handguns at the owner and the owner's father, and threatened to shoot both of them if the owner did not hand over his money. Three days later, on 22 January 2003, defendant was interviewed by Wadesboro Police Detectives about the 19 January 2003 robbery. Defendant waived his *Miranda* rights and confessed to committing the robbery while being interviewed. The alleged offense occurred approximately one month prior to defendant's seventeenth birthday.

On 25 February 2003, defendant was declared indigent and Robert Leas, Esq. ("Leas") was appointed to represent him. On 7 April 2003, defendant was indicted for robbery with a dangerous weapon. On 29 September 2003, the day before trial was to begin, Leas moved to withdraw as counsel and informed the court that he could "no longer competently and professionally represent [defendant]."

Leas told the court that defendant wished to testify in his own defense and that in Leas's opinion defendant's testimony would be false. The trial judge stated that a "mere disagreement between the defendant and court appointed counsel" was not sufficient to grant Leas's motion to withdraw. The trial judge explained to defendant that Leas could not knowingly present evidence to the court that Leas believed to be false and that another lawyer could not be appointed to do the same thing Leas was prohibited from doing. The judge told defendant that if he insisted on testifying in his own behalf, defendant could discharge Leas as counsel and proceed *pro se*.

Defendant responded to the trial court that he wanted to testify on his own behalf and wanted Leas or other counsel to represent him. The record shows further questions and conversations ensued until defendant indicated he would testify and would like to proceed without a lawyer. The trial court allowed Leas to withdraw as counsel and

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placed him on standby to assist defendant if he had any legal questions during trial.

At trial, the convenience store owner positively identified defendant as one of the robbers during the State's case-in-chief. Defendant testified in his own behalf that he was at home on the night of the robbery and was tricked by the police into signing a waiver of his rights and giving a confession.

On 1 October 2003, a jury found defendant to be guilty of one count of robbery with a firearm. The trial court also found defendant to be a Prior Record Level II offender with one prior record point at the time the crime was committed. Defendant was sentenced to a minimum of seventy-two months and a maximum of ninety-six months imprisonment. On 17 August 2006, this Court allowed defendant's petition for writ of *certiorari*.

II. Issues

Defendant argues the trial court erred by: (1) requiring him to choose between testifying and proceeding to a jury trial without assistance of counsel and (2) enhancing his prior record level for being on unsupervised probation at the time of the offense without requiring the State to prove that fact beyond a reasonable doubt and submitting the issue for the jury to decide.

III. Appearance as a *Pro Se* Defendant

[1] Defendant argues the trial court erred in requiring him to choose between testifying or proceeding to a jury trial without the assistance of counsel, in the absence of a clear indication that he wished to and understood the consequences of proceeding *pro se*. We agree.

A. Right to Counsel—Right to Testify

"The Sixth Amendment to the United States Constitution and Article I, Section 23 of the North Carolina Constitution secure a defendant's right to the assistance of counsel." *State v. Frye*, 341 N.C. 470, 493, 461 S.E.2d 664, 675 (1995) (citing *State v. Colbert*, 311 N.C. 283, 286, 316 S.E.2d 79, 80-81 (1984)), *cert. denied*, 517 U.S. 1123, 134 L. Ed. 2d 526 (1996). Although not specifically enumerated in the United States Constitution, the United States Supreme Court has consistently held that a defendant's absolute right to testify is an inherent part of both the due process requirements of the Fifth and Fourteenth Amendments and the compulsory process clause of the Sixth Amendment. *See, e.g., Farett v. California*, 422 U.S. 806, 819, n.15,

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45 L. Ed. 2d 562, 572 (1975) (“Constitutional stature of rights . . . not literally expressed in the document, are essential to due process, [includes a defendant’s right] to testify on his own behalf.”); *Brooks v. Tennessee*, 406 U.S. 605, 612, 32 L. Ed. 2d 358, 364 (1972) (“Whether to testify is [not only] an important tactical decision [for a defendant, but also] a matter of constitutional right.”); *Harris v. New York*, 401 U.S. 222, 225, 28 L. Ed. 2d 1, 4 (1971) (“Every criminal defendant is privileged to testify in his own defense, or to refuse to do so.”).

The record reveals the trial court forced defendant to choose between testifying in his own behalf or being represented by counsel at trial. By choosing to exercise his constitutional right to testify in his own defense, defendant was forced to relinquish his constitutional right to the assistance of counsel. *Frye*, 341 N.C. at 493, 461 S.E.2d at 675.

This Court and our Supreme Court addressed a similar situation in *State v. Luker*, 65 N.C. App. 644, 653, 310 S.E.2d 63, 68 (1983), *rev’d*, 311 N.C. 301, 316 S.E.2d 309 (1984). In *Luker*, this Court held the trial court committed constitutional error by requiring the defendant to choose between testifying or having assistance of counsel at trial. 65 N.C. App. at 652-53, 310 S.E.2d at 67-68.

The relationship between the client and his attorney is that of principal and agent, with the attorney “serv[ing] as counselor and advocate to his client.” *Id.* at 648, 310 S.E.2d at 65.

Like the decision regarding how to plead, *the decision whether to testify is a substantial right belonging to the defendant*. While strategic decisions regarding witnesses to call, whether and how to conduct cross-examinations, what jurors to accept or strike, and what trial motions to make are ultimately the province of the lawyer, certain other decisions represent more than mere trial tactics and are for the defendant. These decisions include what plea to enter, whether to waive a jury trial and *whether to testify in one’s own defense*.

Id. at 649, 310 S.E.2d at 66 (emphasis supplied) (citing *Wainwright v. Sykes*, 433 U.S. 72, 91, 53 L. Ed. 2d 594, 611 (1977) (Burger, C.J., concurring); ABA Standards For Criminal Justice, the Defense Function, § 4-5.2 (1982 Supp.)).

Forcing defendant to elect between having counsel at trial and testifying in his own behalf was improper. “While counsel could have

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advised defendant not to testify, the ultimate decision should have been the defendant's. Defendant's dilemma has been characterized by other courts as a 'Hobson's choice,' *i.e.*, a dilemma involving the relinquishment of one constitutional right in order to assert another." *Id.* at 652, 310 S.E.2d at 67 (citing *Simmons v. United States*, 390 U.S. 377, 19 L. Ed. 2d 1247 (1968)). "[B]y choosing to testify, defendant was forced to give up his constitutional right to counsel." *Id.* Forcing defendant to choose between testifying or relinquishing his right to be represented by counsel constitutes constitutional error. This Court in *Luker*, then held the error was harmless under harmless error review. 65 N.C. App. at 652-53, 310 S.E.2d at 67-68.

B. Harmless Error Review

"[C]onstitutional error is prejudicial unless it is found by the appellate court to be harmless beyond a reasonable doubt." *Colbert*, 311 N.C. at 286, 316 S.E.2d at 81; N.C. Gen. Stat. § 15A-1443(b) (2005). Our Supreme Court has held that some constitutional rights, like the right to counsel, "are so basic to a fair trial that their infraction can never be treated as harmless error." *Colbert*, 311 N.C. at 286, 316 S.E.2d at 81 (citing *Chapman v. California*, 386 U.S. 18, 17 L. Ed. 2d 705 (1967)).

When our Supreme Court reviewed this Court's holding in *Luker*, it held "the Court of Appeals erred in concluding that such denial did not result in reversible error." 311 N.C. at 301, 316 S.E.2d at 309. The trial court erred by forcing defendant to choose between testifying or having the assistance of counsel at trial. We cannot find this error to be harmless beyond a reasonable doubt and are compelled to grant defendant a new trial. *Id.* at 301, 316 S.E.2d at 309.

Recognizing this issue may arise on remand, we turn to the issue of counsel's role on remand. Rule 3.3(a)(3) of the North Carolina State Bar Rules of Professional Conduct (2007) states:

(a) A lawyer shall not knowingly:

....

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, *other than the testi-*

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mony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(Emphasis supplied). Rule 3.3, Comment 9, of the North Carolina State Bar Rules of Professional Conduct (2007) offers further guidance:

Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify.

Defendant is entitled both to testify in his own behalf and to his right to counsel. "[I]t is the province of the jury . . . to assess and determine witness credibility." *State v. Hyatt*, 355 N.C. 642, 666, 566 S.E.2d 61, 77 (2002), *cert. denied*, 537 U.S. 1133, 154 L. Ed. 2d 823 (2003). Defendant was denied his constitutional right to counsel and is entitled to a new trial.

IV. Enhancement of Prior Record Level

[2] Defendant next argues the trial court erred by enhancing his prior record level by adding one point for being on unsupervised probation at the time of the offense without first requiring the State to prove the issue beyond a reasonable doubt and submitting it for the jury to decide. Since this issue may arise again at defendant's trial on remand, we address it.

A. Standard of Review

"A judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play." *State v. Myers*, 61 N.C. App. 554, 557, 301 S.E.2d 401, 403 (1983), *cert. denied*, 311 N.C. 767, 321 S.E.2d 153 (1984).

The failure to submit a sentencing factor to the jury is subject to harmless error review. *State v. Blackwell*, 361 N.C. 41, 49-50, 638 S.E.2d 452, 458 (2006) (*citing Washington v. Recuenco*, — U.S. —, 165 L. Ed. 2d 466 (2006)), *cert. denied*, 548 U.S. 212, 167 L. Ed. 2d 1114 (2007). "In conducting harmless error review, we must determine from the record whether the evidence against the defendant was so 'overwhelming' and 'uncontroverted' that any rational fact-finder

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would have found the disputed aggravating factor beyond a reasonable doubt.” *Id.* at 50, 638 S.E.2d at 458.

B. Analysis

At trial, the State presented the prior record level worksheet to the judge and stated that defendant was a prior conviction Level II. The court assigned defendant an additional point “because the offense was committed while he was on unsupervised probation.” Defendant did not object to this finding and the official court record indicates he was on unsupervised probation for a 2002 conviction.

Defendant claims the United States Supreme Court’s holding in *Blakely v. Washington* entitles him to a new sentencing hearing to allow a jury, rather than a judge, to determine whether he was on probation at the time he allegedly committed the armed robbery. 542 U.S. 296, 159 L. Ed. 2d 403 (2004). In *Blakely*, the United States Supreme Court held that the statutory maximum sentence a court may impose is determined “solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” 542 U.S. at 303, 159 L. Ed. 2d at 413. The trial court erred in not submitting this issue to the jury.

In light of our decision to grant defendant a new trial and the clear requirements of *Blakely*, it is unnecessary to conduct a harmless error review of this issue. If the State elects to prove defendant’s prior probationary status, unless it is admitted by defendant, this issue must be proven beyond a reasonable doubt and submitted to the jury. *Id.*

V. Conclusion

Defendant was denied his constitutional right to counsel when he was forced to choose between testifying in his own defense or having the assistance of counsel at trial. We cannot conclude such constitutional error was harmless beyond a reasonable doubt. The judgment is reversed and this case is remanded for a new trial.

In light of our holding it is unnecessary to conduct a harmless error review on defendant’s assignment of error regarding the trial court’s enhancement of his prior record level and sentence without the issue first being submitted to the jury.

New Trial.

Judges McGEE and ELMORE concur.

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[186 N.C. App. 288 (2007)]

WEBER, HODGES & GODWIN COMMERCIAL REAL ESTATE SERVICES, LLC,
PLAINTIFF v. JOHN D. COOK AND ROSE B. COOK, DEFENDANTS

No. COA07-248

(Filed 2 October 2007)

1. Evidence— testimony of reluctance to sue—not prejudicial

Testimony from the principal in a commercial real estate firm that he had been reluctant to pursue litigation in an action involving a commission was not prejudicial.

2. Real Property— commercial commission—violation of exclusive right to sell

The trial court did not err by denying defendant's motion for a judgment n.o.v. in an action for a commercial real estate commission. Plaintiff met its burden of presenting evidence of its expectation interest; defendants competed with plaintiff and breached their obligations under the exclusive right to sell in the listing agreement.

3. Real Property— commercial commission—damages

The trial court did not err by denying defendants' motion for a new trial in an action concerning a commercial real estate commission. Although defendants argue that the listing agreement limited plaintiff's recovery to actual damages, the agreement contained no such provision and no authority was cited for the proposition.

Appeal by defendants from judgment entered 25 September 2006 and order entered 23 October 2006 by Judge C. Philip Ginn in Watauga County Superior Court. Heard in the Court of Appeals 19 September 2007.

Martin & Gifford, PLLC, by William H. Gifford, Jr., for plaintiff-appellee.

G. Gray Wilson, for defendants-appellants.

TYSON, Judge.

John D. Cook ("defendant") and Rose B. Cook (collectively, "defendants") appeal from judgment entered after a jury awarded Weber, Hodges & Godwin Commercial Real Estate Services, LLC, ("plaintiff") \$178,550.00 in damages. Defendants also appeal from

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order entered denying their motion for judgment notwithstanding the verdict or for new trial. We find no error.

I. Background

Defendants owned a tract of commercial real property (“the property”) located in Boone, North Carolina. On 3 April 2003, plaintiff and defendants entered into a one-year exclusive right to sell listing agreement for the sale and marketing of the property. The agreement provided for a ten percent commission payable on the gross sales price of the property. Plaintiff received and presented two offers to purchase portions of the property to defendants. Defendants rejected the partial sales. The parties renewed the exclusive right to sell listing agreement at the end of the first year. The renewed agreement expired 17 May 2005.

In January or February 2005, while the renewal listing was in effect, Ashok Patel (“Patel”), a local hotel developer, contacted defendant to discuss the property. Defendants failed to inform plaintiff they were discussing the property with Patel. On 18 August 2005, ninety-three days after the expiration of the listing agreement, Patel, through Boone Hospitality, LLC, purchased the property from defendants for \$1,825,000.00. Plaintiff demanded payment of the commission and defendants refused.

Plaintiff filed suit seeking recovery of the commission. On 14 September 2006, a jury returned a verdict in favor of plaintiff and awarded damages in the amount of \$178,550.00. On 25 September 2006, the trial court entered judgment based upon the jury’s verdict. On 3 October 2006, defendants moved for judgment notwithstanding the verdict or for new trial. On 23 October 2006, the trial court denied defendants’ motion. Defendants appeal both the judgment and the trial court’s order.

II. Issues

Defendants argue the trial court erred by: (1) admitting portions of testimony of plaintiff’s principal; (2) denying their motion for judgment notwithstanding the verdict; and (3) denying their motion for a new trial.

III. Testimony of Plaintiff’s Principal

[1] Defendants assert the trial court erred in admitting portions of plaintiff’s principal, Daniel Godwin’s (“Godwin”), testimony and argue Godwin’s testimony was prejudicial, unfairly influenced the

jury, and a different result would have occurred, but for the error. We disagree.

A. Standard of Review

“[A]n error in the admission of evidence is not grounds for granting a new trial or setting aside a verdict unless the admission amounts to the denial of a substantial right.” *Suarez v. Wotring*, 155 N.C. App. 20, 30, 573 S.E.2d 746, 752 (2002), *disc. rev. denied*, 357 N.C. 66, 579 S.E.2d 107 (2003). “The burden is on the appellant to not only show error, but also to show that he was prejudiced and a different result would have likely ensued had the error not occurred.” *Id.*

B. Analysis

Defendants argue the trial court erred by admitting Godwin’s testimony regarding the term “exclusive right to sell” because it is contrary to North Carolina law. In *Insurance & Realty, Inc. v. Harmon*, this Court stated that the term “exclusive right to sell” “precludes the principal himself from competing with the agent.” 20 N.C. App. 39, 42, 200 S.E.2d 443, 445 (1973). Godwin’s testimony stated that “exclusive right to sell” means “the property cannot be sold during that listing term and anyone avoid paying the listing firm the commission specified in the agreement.” Godwin’s explanation of “exclusive right to sell” was consistent with *Insurance & Realty, Inc.*, and the trial court’s admission of this testimony was proper.

Defendants argue Godwin’s testimony that he did not want to pursue litigation and this action was the first commission lawsuit ever filed by plaintiff was designed solely to elicit sympathy. Defendants have failed to show Godwin’s testimony was prejudicial and that a different result would have ensued had the jury not heard this testimony. This assignment of error is overruled.

Defendants also argue the trial court erred in admitting Godwin’s testimony concerning whether he doctored the signature page of the contract. Defendants failed to object to Godwin’s testimony and did not move to strike this testimony. “In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make” N.C.R. App. P. 10(b) (2007). Defendants’ counsel failed to object to this portion of Godwin’s testimony. This issue is not properly before this Court and is dismissed.

IV. Motion for Judgment Notwithstanding the Verdict

[2] Defendants argue the trial court erred in denying their motion for judgment notwithstanding the verdict on the grounds that the evidence is legally and factually insufficient to support a finding of damages against them. We disagree.

A. Standard of Review

The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury. When determining the correctness of the denial for directed verdict or judgment notwithstanding the verdict, the question is whether there is sufficient evidence to sustain a jury verdict in the non-moving party's favor, or to present a question for the jury. Where the motion for judgment notwithstanding the verdict is a motion that judgment be entered in accordance with the movant's earlier motion for directed verdict, this Court has required the use of the same standard of sufficiency of evidence in reviewing both motions.

Davis v. Dennis Lilly Co., 330 N.C. 314, 322-23, 411 S.E.2d 133, 138 (1991) (internal citations and quotations omitted).

B. Analysis

"As a general rule, the injured party in a breach of contract action is awarded damages which attempt to place the party, insofar as possible, in the position he would have been in had the contract been performed." *Strader v. Sunstates Corp.*, 129 N.C. App. 562, 571, 500 S.E.2d 752, 757, *disc. rev. denied*, 349 N.C. 240, 514 S.E.2d 274 (1998). "[T]he injured party has a right to damages based on his expectation interest as measured by . . . the loss in the value to him of the other party's performance caused by its failure or deficiency." *First Union Nat'l Bank v. Naylor*, 102 N.C. App. 719, 725, 404 S.E.2d 161, 164 (1991) (internal quotations omitted). "The interest being protected by this general rule is the non-breaching party's expectation interest, and in so doing, the injured party receives the benefit of the bargain." *Id.*

The exclusive right to sell listing agreement entered into by the parties states the "Listing Agency shall have the exclusive right to sell the Property as agent of the Seller." The agreement provides a ten percent (10%) commission of the gross sales price of the property to be paid to plaintiff upon the sale of the property.

Paragraph 6.a. of the listing agreement provides:

EXCLUSIVE RIGHTS: Seller agrees to cooperate with Listing Agency (or agents acting for or through it) to facilitate the sale of the Property. *The Property may be shown only by appointment made by or through Listing Agency. Seller shall refer to Listing Agency all inquiries or offers it may receive regarding this Property.* Seller agrees to cooperate with Listing Agency in bringing about a sale of the Property, to furnish Listing Agency with a copy of any lease or master lease affecting the Property and to *immediately refer to Listing Agency all inquiries by anyone interested in the Property. All negotiations shall be conducted through Listing Agency.* Listing Agency shall be identified as the contact firm with all state and local economic development agencies being notified of the Property's availability.

(Emphasis supplied).

Paragraph 6.c. provides:

LATER SALE TO PROSPECT: If within 120 days after the expiration of the exclusive listing period Seller shall directly or indirectly sell or agree to sell the Property to a party to whom the Listing Agency . . . has communicated concerning the Property during this exclusive period, Seller shall pay Listing Agency the same commission to which it would have been entitled had the sale been made during the exclusive listing period; provided, that the names of prospects are delivered or post-marked to the Seller within 25 days after the expiration of the exclusive listing period.

Plaintiff presented evidence of: (1) a sale of defendants' property being consummated within the applicable time period of the listing agreement; (2) the sales commission percentage due it, as set forth in the listing agreement; (3) defendants' breach of the listing agreement; and (4) its damages as a result of defendants' breach. Plaintiff met its burden of presenting evidence of its expectation interest. Defendants competed with plaintiff and breached their obligations under the exclusive right to sell clause of the listing agreement.

Viewed in the light most favorable to the non-moving party, plaintiff presented sufficient evidence for the issues to be submitted to the jury. The trial court properly denied defendants' motion for judgment notwithstanding the verdict. This assignment of error is overruled.

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V. Motion for New Trial

[3] Defendants argue the trial court erred in denying their motion for a new trial based upon insufficiency of the evidence. We disagree.

A. Standard of Review

The standard of review for a trial court's denial of a motion for a new trial based upon insufficiency of the evidence is abuse of discretion. *In re Will of Buck*, 350 N.C. 621, 624, 516 S.E.2d 858, 860 (1999). " 'An appellate court should not disturb a *discretionary* Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice.' " *Id.* at 625, 516 S.E.2d at 861 (quoting *Anderson v. Hollifield*, 345 N.C. 480, 483, 480 S.E.2d 661, 663 (1997)) (alteration in original).

B. Analysis

Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure states:

The body of the argument . . . shall contain citations of the authorities upon which the appellant relies. Evidence or other proceedings material to the question presented may be narrated or quoted in the body of the argument, with appropriate reference to the record on appeal or the transcript of proceedings, or the exhibits.

N.C.R. App. P. 28(b)(6) (2007). "The North Carolina Rules of Appellate Procedure are mandatory and 'failure to follow these rules will subject an appeal to dismissal.' " *Viar v. N.C. DOT*, 359 N.C. 400, 401, 610 S.E.2d 360, 361 (2005) (quoting *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999)).

Defendants argue that the Listing Agreement limited plaintiff's recovery to actual damages. Defendants cite no authority for this statement and the Listing Agreement contains no provision limiting plaintiff's recovery to its actual damages. In the absence of any authority cited or any evidence that the agreement limited plaintiff's recovery, this assignment of error is dismissed.

VI. Conclusion

The trial court properly admitted Godwin's testimony. Defendants have not shown the admission of the testimony to be error or that they were "prejudiced and a different result would have likely occurred had the error not occurred." *Suarez*, 155 N.C. App. at 30, 573 S.E.2d at 752. Defendants failed to object to or move to strike a por-

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tion of Godwin's testimony. This assignment of error is dismissed. The trial court properly denied defendants' motion for judgment notwithstanding the verdict.

Viewed in the light most favorable to the non-moving party, plaintiff presented sufficient evidence supporting each element of its breach of contract claim. The trial court did not abuse its discretion by denying defendants' motion for a new trial based upon insufficiency of the evidence. We find no error in the jury's verdict or the judgment entered thereon or the trial court's order.

No Error.

Judges McGEE and ELMORE concur.

STATE OF NORTH CAROLINA v. JOSE ARTURO ARIAS, DEFENDANT

No. COA07-58

(Filed 2 October 2007)

1. Criminal Law— withdrawal of guilty plea—agreement not violated

The trial court did not err by denying defendant's motion to withdraw a guilty plea, based on breach of the agreement by the State, where the agreement did not specifically include release from custody and the State fulfilled the promises in the agreement. The lengthy delay between the plea and the motion, the lack of a fair and just reason, and the prejudice to the State (evidence was destroyed) overwhelmingly support the denial of the motion.

2. Criminal Law— withdrawal of guilty plea—frustration of purpose—motion properly denied

The trial court did not err by denying defendant's motion to withdraw his guilty plea based on frustration of purpose. Though he argued that there was an implied condition that he would be released to provide assistance to the State, the State's share of the bargain was to dismiss a charge, defer sentencing, and agree to an unsecure bond, which it did. Moreover, the event which prevented release, extradition to Maryland, was reasonably foresee-

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able in that defendant had waived extradition well in advance of the plea.

Appeal by defendant from judgment entered 23 August 2006 by Judge David S. Cayer in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 September 2007.

Attorney General Roy Cooper, by Assistant Attorney General Iain Stauffer, for the State.

McAfee Law, P.A., by Robert J. McAfee, for defendant-appellant.

BRYANT, Judge.

Jose Arturo Arias (defendant) pled guilty to trafficking cocaine on 1 July 2003. As part of the plea agreement, the State agreed to dismiss a charge of conspiracy to traffic cocaine and to defer sentencing to allow defendant to render substantial assistance to the State. The trial court noted the term “substantial assistance” meant “identification, arrest or conviction of any accomplice, accessories or co-conspirator or [principals].” The State then agreed to an unsecured bond in the amount of \$25,000. Defendant was not actually released from custody but was extradited to Maryland on 30 July 2003 to face pending charges. On 15 September 2003, a Maryland trial court sentenced defendant to two months imprisonment with a credit for two months served. Defendant was subsequently released from custody in Maryland and was deported to Mexico twice in 2004.

On 27 March 2006 defendant was stopped for a traffic incident in North Carolina and subsequently arrested. On 21 April 2006 he filed a motion to withdraw the guilty plea he entered in 2003. Defendant’s motion was denied at a hearing held on 23 August 2006. The trial court sentenced defendant to an active term of seventy to eighty-four months imprisonment with the North Carolina Department of Correction. Defendant appeals.

Defendant raises two issues on appeal: (I) whether the trial court erred in denying his motion because the State failed to uphold its end of the plea agreement, and (II) whether the trial court erred in denying his motion on the basis of frustration of purpose.

I

[1] Defendant first argues the State is bound by the plea agreement which it breached by failing to release defendant from custody.

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Defendant was therefore unable to render substantial assistance to the State, which was the purpose of the plea agreement, and he did not receive the benefit of the bargain. In denying defendant's motion to withdraw his guilty plea, the trial court found the State did not breach the plea agreement because the State dismissed the charge it said it would dismiss, it continued the sentencing to allow defendant to try to provide substantial assistance, and it agreed to the unsecured bond. The trial court noted defendant's extradition to Maryland was not something the State brought about, and therefore could not be the basis for arguing the State breached the plea agreement.

In examining a decision to grant or deny a motion to withdraw a guilty plea, an appellate court does not use an abuse of discretion standard but makes an independent review of the record. *State v. Marshburn*, 109 N.C. App. 105, 108, 425 S.E.2d 715, 718 (1993). Although there is no absolute right to withdraw a guilty plea, motions to do so will be liberally granted, particularly if made early in the proceedings. *State v. Handy*, 326 N.C. 532, 537, 391 S.E.2d 159, 161-62 (1990). The defendant must present a fair and just reason. *Id.* at 539, 391 S.E.2d at 162. Factors favoring withdrawal include: (i) whether the defendant has asserted his innocence, (ii) the strength of the State's evidence, (iii) the length of time between the guilty plea and the motion to withdraw it, and (iv) whether defendant has had legal representation at all relevant times. *Id.* at 539, 391 S.E.2d at 163. Other pertinent factors are misunderstanding of the consequences of a guilty plea, hasty entry of the plea, confusion, and coercion. *Id.* Once the defendant has made a sufficient showing, the State may counter by providing "evidence of concrete prejudice to its case by reason of the withdrawal of the plea." *Id.*

Using the factors listed above, defendant did assert his innocence in his motion to withdraw his guilty plea. However, he presented the motion three years after the plea was entered, an extremely lengthy amount of time. Also, defendant does not claim he was not represented by counsel and the record shows he had counsel at his plea hearing; nor does defendant claim misunderstanding, hasty entry, confusion or coercion regarding his plea.

Defendant has also failed to present a fair and just reason for allowing the withdrawal of his plea. Defendant stated he did not enter the plea knowingly and voluntarily because he did not know he was subject to extradition to Maryland. He knew about the pending charges in Maryland, however, because he waived extradition six months prior to pleading guilty in this case. Defendant also argues he

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did not receive the benefit of the bargain he made with the State. It appears from the record, however, that the State fulfilled its promises listed in the transcript of plea. The State dismissed the charge it said it was going to and deferred sentencing. Beyond the transcript of plea, the State agreed to an unsecured bond so defendant could be released. Nowhere in the transcript of plea or the transcript of the plea hearing did the State agree to physically release defendant. Although defendant argues the agreement to defer sentencing was for the express purpose of allowing defendant out of custody so that he could render substantial assistance to the State, his release was not specifically made a condition of the plea agreement. We also note that no evidence was presented at the 23 August 2006 hearing that defendant attempted to render any assistance at all to the State throughout the three years following his guilty plea, whether he was in custody or out of custody.

Furthermore, the State presented evidence of concrete prejudice should the motion be granted, because the evidence in the case was destroyed over two years after defendant entered his guilty plea. The evidence destroyed included the cocaine collected near defendant at the drug bust, as well as a video taken of defendant's drug transaction. The lengthy delay between defendant's guilty plea and his motion, the lack of a fair and just reason, and the prejudice to the State overwhelmingly support the denial of defendant's motion. Therefore, this assignment of error is overruled.

II

[2] Defendant's second argument regarding frustration of purpose is likewise untenable. "Changed conditions supervening during the term of a contract sometimes operate as a defense excusing further performance on the ground that there was an implied condition in the contract that such a subsequent development should excuse performance or be a defense" *Brenner v. Little Red Sch. House, Ltd.*, 302 N.C. 207, 211, 274 S.E.2d 206, 209 (1981) (citations and quotation marks omitted). Defendant argues the implied condition in the plea agreement was that defendant would be released from custody, in order for him to attempt to render substantial assistance to the State. However, the terms of the plea agreement were explicit, stating that sentencing would be deferred to a later date, not that the State must release defendant. The State's share of the bargain was to dismiss a charge, defer sentencing, and unsecure defendant's bond. The State upheld its end of the bargain. Moreover, frustration of purpose may not be invoked as a defense where the frustrating event was rea-

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sonably foreseeable. *Id.* Here, defendant waived his extradition to Maryland well in advance of his guilty plea in the instant case and therefore he was aware of the likelihood of being extradited to Maryland. Thus, he may not rely on frustration of purpose for challenging the trial court's decision to deny his motion to withdraw guilty plea. Accordingly, we find the trial court did not err in denying defendant's motion.

No error.

Judges WYNN and ELMORE concur.

IN THE MATTER OF: I.J. AND T.J.

No. COA07-608

(Filed 2 October 2007)

**Termination of Parental Rights— dismissal of first petition—
second petition not barred by res judicata**

A second petition to terminate respondent mother's parental rights was not barred by res judicata after the first petition was dismissed for failure to conduct the adjudicatory hearing within 90 days after the petition was filed because there was no identity of issues between the first and second petitions where the trial court ordered that grounds for termination under the second petition could only be established by facts that occurred after the first petition was filed; findings of fact in the termination order as to events that occurred prior to the filing of the first petition were essentially background information without which the order would not make sense; and the substantive factual findings upon which the trial court based its conclusions of law as to the grounds for termination of parental rights all concerned facts that occurred after the first petition was filed.

Appeal by respondent from order entered 13 February 2007 by Judge Lawrence C. McSwain in Guilford County District Court. Heard in the Court of Appeals 4 September 2007.

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[186 N.C. App. 298 (2007)]

Office of Guilford County Attorney, by Deputy County Attorney James A. Dickens, for petitioner-appellee.

Michael E. Casterline for respondent-appellant.

STROUD, Judge.

Respondent mother appeals from an order terminating her parental rights to her daughter, I.J., and her son, T.J. For the following reasons, we affirm.

The Guilford County Department of Social Services (DSS) took non-secure custody of I.J. and T.J. in April of 2002 and the trial court adjudicated the children neglected and dependent in October of 2002. On 24 June 2004, DSS filed its first petition to terminate respondent mother's parental rights (hereinafter "2004 termination petition") based upon the grounds that respondent mother had neglected her children under N.C. Gen. Stat. § 7B-1111(a)(1); had willfully left the children in foster care for more than twelve months under N.C. Gen. Stat. § 7B-1111(a)(2); and had failed to pay a reasonable portion of the cost of care for the children under N.C. Gen. Stat. § 7B-1111(a)(3). In April of 2005, I.J. and T.J. were returned to respondent mother on a trial placement, but were placed back in foster care four months later.

The 2004 termination petition came on for hearing on 13 March 2006. Before evidence was presented, respondent mother moved to dismiss the petition because the adjudicatory hearing had not been held within ninety days from the filing of the petition, as required by N.C. Gen. Stat. § 7B-1109(a). By order filed 30 March 2006, the trial court dismissed the petition on the grounds that the 13 March 2006 "hearing [was] in excess of 20 months from the date of filing the petition to terminate parental rights." The order further stated: "The [2004 termination] petition refers to dates and events occurring in 2002 or later, and that the delay in proceeding will result in prejudice and hardship to the respondent, based on the ability to remember events so distant, and to defend the petition."

On 6 April 2006, DSS filed a second petition to terminate the parental rights of respondent mother on the same three grounds alleged in the 2004 petition. Respondent mother denied the material allegations and moved to dismiss the second petition based on the defense of *res judicata*, alleging that the 2004 termination petition was dismissed with prejudice. In the alternative, respondent mother moved that the court limit the matters of evidence to those facts

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occurring after 13 March 2006. By order signed 2 November 2006, the trial court ordered that the “use of evidence concerning matters occurring prior to June of 2004 is [limited] to general factual allegations and [it is] require[d] that the grounds for relief under the Petition must be established by facts which have occurred after June 24, 2004.” Following a hearing on the second termination petition, the trial court concluded that grounds for termination of respondent mother’s parental rights existed under N.C. Gen. Stat. § 7B-1111(a)(1), (a)(2) and (a)(3), and entered an order terminating those rights on 13 February 2007. Respondent mother appeals.

In her sole argument on appeal, respondent mother contends the proceedings for termination of parental rights were barred by the doctrine of *res judicata*. We disagree.

Under the doctrine of *res judicata*, a final judgment on the merits in a prior action will prevent a second suit based on the same cause of action between the same parties or those in privity with them. Generally, in order that the judgment in a former action may be held to constitute an estoppel as *res judicata* in a subsequent action there must be identity of parties, of subject matter and of issues.

Merrick v. Peterson, 143 N.C. App. 656, 662, 548 S.E.2d 171, 175-76 (2001) (internal citations and quotations omitted).

As noted above, the trial court ordered on 2 November 2006 that “the grounds for relief under the Petition must be established by facts which have occurred after June 24, 2004.” Respondent argues that some of the findings of fact in the termination order deal with events that occurred prior to June 24, 2004, although we note that respondent did not assign error to the findings of fact on that basis.¹ However, the trial court also decreed in its 2 November 2006 order that “use of evidence concerning matters occurring prior to June of 2004 is [limited] to general factual allegations and [it is] require[d] that the grounds for relief under the Petition must be established by facts which have occurred after June 24, 2004.” The findings of fact in the termination order as to events prior to 24 June 2004 are essentially

1. Respondent did assign error to all except the first two findings of fact in the termination order, all on the same basis, that each finding was not “supported by sufficient clear, cogent and convincing evidence and thus violates the requirements of N.C.G.S. § 7B-1109(f).” However, respondent has not presented any argument on appeal regarding sufficiency of the evidence to support any finding of fact and has cited no authorities in this regard, so this argument is deemed abandoned. N.C.R. App. P. 28(b)(6).

IN RE J.B.

[186 N.C. App. 301 (2007)]

background information without which the order would not make sense. For example, finding three is that “[t]he children first came into DSS custody on July 13, 2000, due to inappropriate supervision and failure of the Respondent mother, [J.O.], to access services to prevent an injurious environment.” Findings four, five and six then recite the general procedural history of the DSS’s involvement with the children from the time they came into DSS custody up to 1 April 2005. The substantive factual findings upon which the trial court based its conclusions of law as to the grounds for termination of parental rights are all facts which occurred after 24 June 2004. Since the trial court specifically based its order only upon facts which occurred after the filing of the first petition, there is not identity of issues between the first and second petitions and *res judicata* does not apply.²

Accordingly, we conclude that the order for termination of parental rights should be

Affirmed.

Judges STEELMAN and JACKSON concur.

IN THE MATTER OF: J.B.

No. COA06-1691

(Filed 2 October 2007)

Juveniles— untimely filing of petition—lack of subject matter jurisdiction—disposition order vacated

The trial court lacked subject matter jurisdiction to consider a juvenile petition for commission of the criminal offense of misdemeanor larceny, and the disposition order entered on an adjudication of delinquency is vacated, because: (1) N.C.G.S. § 7B-1703 provides that the petition must be filed within, at a maximum, thirty days after receipt of the complaint; and (2) although the intake counselor made a timely determination that

2. Because we conclude that there was not identity of the issues between the first and second petitions, we need not reach the issue of whether the dismissal of a petition for termination of parental rights on the basis of violation of the ninety day requirement of N.C. Gen. Stat. § 7B-1109(a) is a final judgment on the merits for the purposes of *res judicata*.

IN RE J.B.

[186 N.C. App. 301 (2007)]

a petition should be filed, the petition was not filed in the office of the clerk of superior court until more than thirty days after receipt of the complaint.

Appeal by juvenile from order entered 16 August 2006 by Judge Craig Croom in Wake County District Court. Heard in the Court of Appeals 24 September 2007.

Attorney General Roy Cooper, by Assistant Attorney General Tina Lloyd Hlabse, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Charlesena Elliott Walker, for defendant-appellant.

BRYANT, Judge.

J.B.¹ (juvenile) appeals from a disposition order entered on an adjudication of delinquency for commission of the criminal offense of misdemeanor larceny. The record shows that on 9 May 2006, Investigator D. L. Tanner of the Wake County Sheriff's Office submitted a complaint to a juvenile court intake counselor alleging that on or about 18 April 2006 J.B. committed a misdemeanor offense. On 8 June 2006 the intake counselor approved the matter for filing as a juvenile petition. The juvenile petition was ultimately filed in the office of the clerk of superior court on 24 July 2006.

J.B. contends the court lacked subject matter jurisdiction to consider the petition because it was not filed in a timely fashion. Although not raised in the trial court, this issue may be addressed for the first time on appeal. *State v. Beaver*, 291 N.C. 137, 139-40, 229 S.E.2d 179, 181 (1976).

The pleading in a juvenile action is the petition alleging delinquency or dependency. N.C. Gen. Stat. § 7B-1801 (2005); *In re Register*, 84 N.C. App. 336, 343, 352 S.E.2d 889, 893 (1987). An action in juvenile court is commenced by the filing of a petition in the clerk's office or by a magistrate's acceptance of a petition for filing when the clerk's office is not open. N.C. Gen. Stat. § 7B-1804 (2005). When a juvenile court counselor receives a complaint regarding a juvenile, the counselor is required to evaluate the complaint and determine whether a petition should be filed. *Id.* The counselor is required to make this determination within fifteen days of receipt of the complaint, with an extension for a maximum of fifteen additional days at

1. Initials are used throughout the opinion to protect the identity of the juvenile.

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the discretion of the chief court counselor, thereby giving the counselor a maximum total of thirty days. N.C. Gen. Stat. § 7B-1703(a) (2005). “[I]f the juvenile court counselor determines that a complaint should be filed as a petition, the counselor shall file the petition as soon as practicable, but in any event within 15 days after the complaint is received, with an extension for a maximum of 15 additional days at the discretion of the chief court counselor.” N.C.G.S. § 7B-1703(b) (2005). Thus, the petition must be filed within, at a maximum, thirty days after receipt of the complaint.

Here, the intake counselor made a timely determination that a petition should be filed. However, the petition was not filed in the office of the clerk of superior court until 24 July 2006, more than thirty days after receipt of the complaint on 9 May 2006. The timely filing of a petition seeking judicial action is jurisdictional. *Chicora Country Club v. Town of Erwin*, 128 N.C. App. 101, 107, 493 S.E.2d 797, 801 (1997). Because the trial court did not have jurisdiction over the petition, the disposition order must be vacated.

Vacated.

Judges WYNN and ELMORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 2 OCTOBER 2007

BARNES v. DANCY No. 07-79	Greene (00CVD203)	Affirmed
BINGHAM v. STEIDEL No. 07-84	Davie (06CVD647)	Dismissed
CAVENDER v. DUKE POWER CO. No. 06-1717	Gaston (06CVS3145)	Affirmed
DAYWALT v. NORANDAL USA, INC. No. 06-1598	Indus.Comm. (I.C. 155195)	Dismissed
HUANG (TOMBRELLO) v. HUANG No. 07-28	Wake (95CVD1078)	Appeal Dismissed
IN RE B.K.C. No. 07-103	Robeson (05JB172)	Affirmed in part; Vacated and re- manded in part
IN RE B.L., J.L., J.H., H.G. No. 07-598	Guilford (06JA494-97)	Affirmed in part; remanded in part
IN RE B.M. No. 07-525	Harnett (06J217)	Reversed
IN RE C.K.C.B. No. 07-651	Rutherford (05JT177)	Affirmed and re- manded with instructions
IN RE C.S., A.M., Z.B., A.B. No. 07-603	Cleveland (06JA63-66)	Affirmed
IN RE G.D.H., D.G.H., N.C.H. No. 07-390	Davidson (06J121-23)	As to first argument, dismissed. As to second argument, affirmed.
IN RE S.M.B. & T.M.B. No. 07-568	McDowell (03J17) (03J108)	Affirmed
PACK v. HAPPY RENTZ, INC. No. 07-129	Indus. Comm. (I.C. 938993)	Affirmed
PARHAM v. PARHAM No. 06-1597	Transylvania (03CVD231)	Dismissed
PARK v. YOUNG HOMES, INC. No. 07-67	Wake (03CVS15252)	Dismissed

PROGRESS ENERGY CAROLINAS, INC. v. SULLIVAN No. 07-287	Pender (05CVS471)	Dismissed
SILVER v. GMRI, INC. No. 06-1588	Wake (04CVS17648)	No error
STATE v. BETHEA No. 07-83	Scotland (05CRS52460-61) (06CRS514)	No error
STATE v. BRYANT No. 06-1555	Caldwell (03CRS3205)	No error
STATE v. COREY No. 04-736-2	Martin (01CRS370)	Remanded for resentencing
STATE v. COVINGTON No. 06-1575	Mecklenburg (03CRS241344) (03CRS239047) (03CRS241350) (03CRS239050) (03CRS241346) (03CRS241676) (03CRS241679) (06CRS16344) (03CRS241674) (03CRS241675) (03CRS241680)	No error
STATE v. DAVIS No. 07-429	Guilford (06CRS24111) (06CRS24193)	Reversed and remanded
STATE v. DOMINGUEZ No. 06-1578	Forsyth (06CRS51434)	No error
STATE v. DUNCAN No. 07-211	Onslow (05CRS52873)	Remanded for reasons stated in this opinion
STATE v. DUNLAP No. 07-356	Stanly (06CRS53693)	No error
STATE v. FEASTER No. 07-154	Cleveland (06CRS53544)	No error
STATE v. FRANKS No. 07-95	Davidson (03CRS57752) (03CRS57231-32)	Affirmed and re- manded for correc- tion of clerical error
STATE v. GADDY No. 06-1561	Guilford (03CRS24610) (03CRS91697-99) (03CRS91702)	No error

STATE v. GONZALEZ No. 06-1090	Alamance (05CRS50678)	No error
STATE v. GRACE No. 07-500	Cumberland (03CRS50348)	Affirmed
STATE v. HARDY No. 07-587	Wilkes (04CRS54959)	Dismissed
STATE v. HENGSTENBERG No. 06-1661	Buncombe (05CRS5973) (05CRS56485-6)	No error
STATE v. HERBERT No. 06-1698	Guilford (05CRS101907)	No error
STATE v. JOHNSON No. 06-1654	Wayne (05CRS54781)	Affirmed
STATE v. LENDER No. 06-1632	Greene (04CRS50820)	No error in part, re- versed and re- manded for resen- tencing in part
STATE v. LONG No. 06-1602	Lincoln (05CRS53760) (06CRS30)	No error
STATE v. MALDONADO No. 07-504	Craven (06CRS52152-53) (06CRS52273-74) (06CRS52276-77) (06CRS52301) (06CRS53474-76)	Dismissed
STATE v. MATTHEWS No. 07-277	Guilford (05CRS76825)	No error
STATE v. McCRAV No. 07-316	Orange (05CRS52318)	No error
STATE v. MINTON No. 06-1566	Forsyth (04CRS60295)	No error
STATE v. MORGAN No. 06-1658	Caldwell (02CRS3663)	No error
STATE v. PURCELL No. 07-268	Hoke (05CRS2452)	Dismissed
STATE v. ROGERS No. 06-1633	Onslow (05CRS52919) (05CRS52921) (05CRS52923)	No error

STATE v. SHUMATE No. 06-1450	Wilkes (05CRS52797)	No error
STATE v. SLEDGE No. 07-189	Greene (06CRS50577)	No error
STATE v. SMITH No. 06-1657	Guilford (05CRS24018) (04CRS96609-10)	No error
STATE v. WADE No. 07-162	Cabarrus (06CRS3771) (06CRS51990)	No error
STATE v. WARREN No. 07-220	Halifax (06CRS52077) (06CRS52083)	No error
STEEN v. KENNEDY No. 07-232	Jackson (05CVS597)	Affirmed

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STATE OF NORTH CAROLINA, PLAINTIFF v. AUDREY GOBAL, DEFENDANT

No. COA06-773

(Filed 16 October 2007)

1. Evidence—lay opinion testimony—statutory limit—matter of fact—opinion as to witness credibility—not plain error

A detective's testimony in a prosecution for first-degree sexual offense and related crimes against a child that a State's witness must have been less nervous during an interview with the detective because he was breathing less hard was an instantaneous conclusion as to mental state and matter of fact that was not subject to the limits of lay opinion testimony provided by N.C.G.S. § 8C-1, Rule 701. The detective's further testimony that because the witness became less nervous during the interview, he must have been telling the truth, was not a statement of fact, was subject to the Rule 701 limits of lay opinion testimony, and was inadmissible since it was an opinion on the credibility of the witness that was not helpful to the jury's determination of a fact in issue. However, the admission of this opinion testimony was not plain error where the case ultimately rested on whether the jury believed that story of the State's witness or that of defendant, and given the amount of testimony which directly or indirectly impeached defendant, the jury had ample evidence besides the detective's testimony which might have caused it to disbelieve the story of defendant and believe the story of the State's witness.

2. Evidence—cross-examination—invited error

The trial court did not err in a double first-degree sex offense, felony child abuse, and indecent liberties with a child case by allowing the testimony of a social worker during cross-examination by defendant because statements elicited by a defendant on cross-examination are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law.

3. Appeal and Error—preservation of issues—failure to raise constitutional issue at trial

The trial court did not err by sentencing defendant to consecutive terms of imprisonment for two counts of first-degree sexual offense even though defendant contends it violates the constitutional guarantee against double jeopardy, because: (1)

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defendant's vague passing mention of this issue after the jury had been instructed, returned its verdict, and had been dismissed from the courtroom was not sufficient to show it raised this constitutional issue to the trial court; and (2) defendant thus failed to preserve this issue for appellate review.

Judge HUNTER concurring in part and dissenting in part.

Appeal by defendant from judgments entered 13 April 2005 by Judge John R. Jolly, Jr. in Wake County Superior Court. Heard in the Court of Appeals 19 February 2007.

Attorney General Roy A. Cooper, III, by Assistant Attorney General David Gordon, for the State.

Brian Michael Aus for defendant-appellant.

STROUD, Judge.

On 27 July 2004, defendant was indicted by the Wake County Grand Jury on two counts of first-degree sexual offense, one count of felony child abuse, and one count of indecent liberties with a child. Defendant was tried before a jury in Wake County Superior court from 11 to 13 April 2005. The jury found defendant guilty of all charges. Thereafter, the trial court sentenced defendant to 230 to 285 months for first-degree sexual offense, felony child abuse, and indecent liberties with a child, and to a consecutive sentence of 230 to 285 months for first-degree sexual offense. Defendant appeals.

For the reasons which follow, we hold that the trial court did not commit plain error when it admitted the testimony of a police detective which tended to vouch for the veracity of the State's main witness. We further hold that defendant invited any error assigned to the testimony of a social worker which tended to impeach defendant. Finally, we hold that defendant failed to preserve the constitutional question of double jeopardy for appellate review. Accordingly, defendant received a fair trial and her convictions are affirmed.

I. Background

Defendant's convictions arose from events which occurred on 2 April 2004 and involved defendant's seven year-old daughter ("Victim"). John Paul McCloskey ("McCloskey"), with whom defendant began a sexual relationship in January of 2004, participated in those events. At the time of defendant's trial, McCloskey was charged

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with two counts of first-degree statutory sexual offense and with taking indecent liberties with a child as a result of his participation.

McCloskey and the victim were the only eyewitnesses other than defendant. The victim was not called to testify at trial. McCloskey was the State's main witness, and defendant testified in her own behalf. The State also offered into evidence tape recordings of two phone conversations McCloskey had with defendant, and three witnesses whose testimony either corroborated McCloskey's testimony or tended to impeach defendant.

McCloskey testified as follows: At some time prior to 2 April 2004, defendant mentioned to him that she had fantasies of herself, McCloskey, and the victim all having sex together. On Friday, 2 April 2004, defendant and the victim arrived at about 1:30 p.m. at McCloskey's apartment in Apex to spend the weekend. The three of them went out to the mall for a while and returned to his apartment to have dinner. While defendant was cleaning up the dishes, McCloskey washed the victim's hair, as requested by defendant. By about 6:00 p.m., the three of them sat down to watch TV. Defendant then grabbed the victim and McCloskey by their hands and brought both of them into the bedroom. In the bedroom, defendant lay down on her back, with no clothes on. McCloskey was wearing shorts, and the victim was wearing a T-shirt and underwear. McCloskey described the victim's demeanor at this point as "easygoing." McCloskey then began to perform cunnilingus on defendant. According to McCloskey, the victim interjected, "I can take care of Mom from here," so McCloskey began kissing defendant while the victim masturbated her. After kissing McCloskey, defendant performed fellatio on him for about ten minutes. During the time that defendant was performing fellatio on McCloskey, the victim continued to masturbate defendant. Defendant then asked the victim if she would like McCloskey to do the same thing to her that he had done to defendant, referring to cunnilingus. McCloskey then performed cunnilingus on the victim for about three to five minutes. Defendant then told the victim to "[g]o down and lick [McCloskey's] penis" and the victim then performed fellatio on McCloskey, while McCloskey kissed defendant. McCloskey and defendant completed the sexual encounter by having intercourse while the victim was lying on the bed next to them. They then got dressed and went to the living room to watch a movie or TV. Defendant and the victim stayed with McCloskey for the rest of the weekend but nothing else "weird" happened. Defendant and the victim returned to their home in Pender County on Sunday.

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According to McCloskey, defendant was worried about losing her children if anyone found out about the events of 2 April 2004. He and defendant discussed the sexual encounter several times after it had occurred, and defendant tried to figure out ways that they could maintain consistency in their stories, so that “neither one of [them] got in trouble.” They considered saying that “[McCloskey] just licked [the victim] or gave [the victim] oral sex and that [defendant] was not in the room.” or that defendant “caught [McCloskey and the victim] on the couch.”

McCloskey further testified that on 14 June 2004, he met with Detective Tim Kerley at the Apex Police Department for an interview. At the beginning of the interview, McCloskey denied that anything happened with the victim, but after Detective Kerley suggested that he take a polygraph test, McCloskey decided that he would admit what really happened. McCloskey testified that he decided to tell the truth because he was feeling awful and guilty about what had happened. McCloskey gave Detective Kerley a handwritten statement regarding the events of 2 April 2004, which was admitted into evidence.

According to McCloskey, after he gave the handwritten statement to Detective Kerley, McCloskey left the police department and contacted his attorney. McCloskey’s attorney provided him with a tape recorder to record some conversations with defendant. McCloskey decided to record these conversations with defendant because defendant had asked him to change his statement to say that “she wasn’t involved or implicated in any way.” The State offered into evidence, without objection, recordings that McCloskey made of two telephone conversations with defendant, each about 20 minutes long, on 19 June 2004 and 20 June 2004. In the 19 June 2004 conversation, defendant asked McCloskey to “talk to my lawyer and tell her a different story.” She asked McCloskey if he was going to try to help her out and stressed to him that she did not want to lose her children and that the unborn baby was his.¹ McCloskey stated in the conversation that because of the charges, he did not think that either of them would be able to be around children and that his father would like to adopt the baby. Defendant responded “that don’t [sic] have to be, John. If you’ll help me, if you’ll change your story and at least be for me and not totally against me . . . do it for the baby’s sake.” After further conversation about the possibility of a perjury charge, defendant told McCloskey, “[t]he only way to save my kids is you. You’re the

1. Defendant had been pregnant for about a month when she began her sexual relationship with McCloskey in January 2004.

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only one that can help me save my kids And at least, John, as long as I have them, I can send you pictures or send your mama pictures of the baby, and you could have some contact, I mean, a little bit.”

In the second phone conversation, recorded 20 June 2004, defendant and McCloskey again discussed defendant’s concern that she would lose her children. Defendant again asked McCloskey if he would try to help her. He asked her what he needed to do. Defendant told him that the “only thing that’s going to help me, and it might not keep me out 100 percent, but help me is to say I wasn’t there [W]e know you’re going to get in trouble no matter what the outcome is, but at least you can help me cover my tracks a little bit.”

Later in the trial, the State called Detective Kerley, who corroborated most of McCloskey’s testimony regarding his interview and written statement. Detective Kerley also testified that McCloskey had asked him on the day of the interview if defendant would lose her child or children. McCloskey phoned Detective Kerley after the interview and asked if he could add on to his written statement so that “[defendant] wouldn’t get into any trouble.” However, McCloskey never repudiated the written statement or the statements he made in the interview with Detective Kerley, even after telling Detective Kerley that he had spoken to some attorneys and they had “told him that he shouldn’t have written out the confession.”

The State also called Keisha Hooks of the Pender County Department of Social Services (DSS) as a witness. Hooks testified that on 13 May 2004 she investigated a report, received by DSS the day before, that the victim had been sexually abused and that defendant had participated in the incident. During an interview with defendant pursuant to the investigation, Hooks informed defendant that there was an allegation that defendant had watched while McCloskey sexually assaulted the victim at his home in Apex. Defendant denied the allegations but admitted that she and the victim had visited McCloskey in Apex. Defendant told Hooks that after the victim was asleep in the bedroom, McCloskey was performing oral sex on defendant in the living room. The victim woke up and came into the living room, so defendant and McCloskey stopped as soon as they saw her and got dressed. Defendant took the victim back into the bedroom and apologized to her that she had seen what she did. Defendant told Hooks that defendant then went to take a bath, and when she came out of the bathroom, the victim told her that McCloskey had touched her between her legs with his hand and licked her between her legs. Hooks asked defendant why she had

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not reported this, and defendant shook her head and said that “she didn’t think [McCloskey] had done it or could do that.” Defendant did not take the victim to a doctor. Defendant told Hooks that she confronted McCloskey regarding what the victim had told her and he denied it and said he did not know why the victim lied about him. Hooks testified that on or about 15 June 2004, she received a copy of McCloskey’s handwritten confession from Detective Kerley and phoned defendant to ask about it. Hooks testified that during their phone conversation, defendant said that she had talked to McCloskey after his interview with Detective Kerley. Hooks further testified that defendant, changing her story slightly from the 13 May interview, said that when the victim came into the living room, the victim was not wearing her panties and that the victim touched defendant’s naked vagina. Defendant also told Hooks that McCloskey “licked [the victim] between her legs and her vagina one time, and [defendant] told him to stop.” Defendant further said that after this, she went to the bathroom, then she and McCloskey got dressed, the victim went to bed, and defendant told McCloskey that “it could never happen again.”

Finally, the State called Lieutenant Cordelia Lewis of the Pender County Sheriff’s Department to testify. Lt. Lewis testified regarding her investigation of the allegations of sexual abuse of the victim. Lt. Lewis received a report from the victim’s paternal grandparents regarding the victim on a Sunday evening and she went to the victim’s school to talk to her the following Tuesday. After talking to the victim, Lt. Lewis had made the report to DSS which served as the basis for Hooks’ investigation. Lt. Lewis later talked to Detective Kerley and obtained a copy of the Apex police report and McCloskey’s confession.

On 16 June 2004, Lt. Lewis and Hooks went together to defendant’s home to talk to her. Defendant’s story as recounted by Lt. Lewis was slightly different from the account defendant gave Hooks earlier. Defendant told Lt. Lewis at this meeting that McCloskey was performing oral sex on her when the victim walked in, but they did not know the victim was there. The victim then touched defendant on the thigh, not on her vagina. In response, defendant “sat up and asked [the victim] what she was doing.” Defendant was upset and crying, and she went to the bathroom. When defendant returned from the bathroom, the victim was touching McCloskey’s penis. Defendant asked “what are you-all doing?” and by the time she said this, McCloskey stopped. Defendant then took the victim into the bath-

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room but the victim would not tell defendant anything. Defendant then told McCloskey to go to bed in his bed and that she and the victim would get in theirs. The next morning, on the way home, the victim asked if she and McCloskey could “play” again, and defendant told her no, “that would never happen again.” Lt. Lewis testified that defendant said that she had lied before because she did not want to lose her daughter. Defendant signed a statement of her interview with Lt. Lewis.

Defendant testified on her own behalf at trial, offering a version of events again somewhat different from what Hooks and Lt. Lewis testified that she told them. Defendant admitted that she and the victim had visited with McCloskey for the weekend. She testified that the victim had walked into the bedroom when McCloskey was performing oral sex on defendant, that she realized the victim was there when she felt a touch on her thigh, and she pushed McCloskey back and sat up in bed. She was upset and started crying, hugged the victim, and then went into the bathroom because she was sick, leaving the victim and McCloskey in the room together. She took a shower and when she was coming down the hall returning to the bedroom, she could hear McCloskey and the victim talking but could not understand them. She heard McCloskey say “stop” and the victim jumped when defendant entered the room. She said she did not see anything happen, but “hollered at [the victim]. . . , ‘what are you doing?’ ” She took the victim into the bathroom and talked to her, and she then asked McCloskey if he had done anything to the victim. He denied that he had. Defendant denied her previous statements to Hooks regarding any knowledge of McCloskey having any form of sexual contact with the victim or of the victim touching defendant’s vagina.

II. Issues

Defendant has addressed in her brief only three of her six assignments of error. The three assignments of error not addressed in her brief are deemed abandoned. N.C.R. App. P. 28(b)(6). As to the remaining assignments of error, defendant contends that the trial court committed plain error by allowing a police detective to vouch for the veracity of McCloskey, the State’s main witness. Defendant further contends that the trial court committed plain error by allowing Hooks, a social worker, to testify that defendant had not told her the truth. Finally, defendant contends that the trial court erred by sentencing defendant to consecutive terms for two counts of sexual offense which arose from the same transaction.

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III. Admission of Evidence

A. Testimony of Police Detective

[1] Defendant contends that she is entitled to a new trial because the trial court committed plain error when it allowed Detective Tim Kerley of the Apex Police Department to offer an opinion which tended to vouch for the veracity of McCloskey. We disagree.

At trial, the following testimony was elicited from Detective Kerley by the State:

Q. Take the jury through what happened in your interview with Mr. McCloskey.

A. When Mr. McCloskey arrived, I set him down and asked him some preinterview questions to basically see whether he was being deceptive. I asked him if he did do this to [the victim], and he denied it at first. After I determined that I thought he was deceptive, I came back and started asking him questions where he finally admitted to me that he and Audrey had done it to the little girl.

Q. Can you tell the jury what you meant by you thought he was being deceptive?

A. During the preinterview questions, I listened to how he answered the questions versus what a normal person would answer a question versus how a deceptive person would answer. Also the demeanor and how he acted when you asked those questions.

Q. Things like body language and tone of voice play into that—those evaluations by you; is that right?

[Defense Counsel]: Object to the leading, Your Honor.

THE COURT: Well, don't lead him. Overruled, but don't lead him.

Q: things do you look for in trying to determine whether or not a person is being deceptive or not?

A. Just to—for example, I look for eye contact, whether they're looking straight at me when they're answering the question or they're looking down or somewhere else in the room; how they sit in the chair; if they are sitting still; if they adjust their movements while they're answering the questions; groping, grooming themselves, and things of that nature.

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Q. What did you observe about Mr. McCloskey before—leading up to the point of where he started telling you what happened?

A. I observed Mr. McCloskey, to the best of my recollection—I'll have to go back and look at my report. He was very nervous. You know, his breathing was really hard, more so than what—an average person who hadn't done anything, in my *opinion*. I remember one time he did—he—a couple of times he did look down when he was answering those questions.

Q. At some point his demeanor changed; is that correct?

A. Yes, sir, to the best of my recollection.

...

Q. Okay. Now, at some point—earlier we talked a lot about his demeanor and how he was looking down. At some point after he said he would tell you the truth, what were your observations about his demeanor at that pint [sic]?

A. He was still nervous, as best I recall, but I don't think he was quite breathing as hard. I mean, I can give you my *impression* of why [McCloskey] told me the truth, if you want me to tell you that.

Q. Go ahead.

A. I felt like he really wanted to tell somebody what he did. You know, I felt like he felt guilty about it and just wanted to get it out and talk to somebody.

(Emphasis added.)

Defendant did not object at trial to this testimony from Detective Kerley. Therefore, this Court reviews only for plain error, N.C.R. App. P. 10(c)(4), which defendant correctly noted in her brief. In reviewing for plain error, this Court “must examine the entire record and determine if the . . . error had a probable impact on the jury’s finding of guilt.” *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 379 (1983).

Specifically, defendant argues that the foregoing testimony from Detective Kerley was an opinion. Defendant further argues that Detective Kerley was testifying as an expert, and therefore any opin-

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ion testimony was limited to that permitted by Rule 702.² Alternatively, she argues that if Detective Kerley was testifying as a layman, then any opinion testimony was limited to that permitted by Rule 701. Defendant argues that whether Detective Kerley was testifying as an expert or a layman, an opinion about the credibility of a witness is inadmissible under both Rule 701 or Rule 702, because such an opinion is not helpful to the jury. The State responds that Detective Kerley's testimony was a "shorthand statement of fact," not an opinion, and therefore not subject to the limits of either Rule 701 or Rule 702.

First, this Court must determine whether Detective Kerley was testifying as an expert. If he was, Rule 702 applies, if not, Rule 701 applies. Nothing in the record indicates that Detective Kerley was testifying as an expert; thus, Rule 701 is the proper rule to apply to the case *sub judice*. Rule 701 bars opinion testimony from a lay witness, except for "opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701.

Second, we must determine if the testimony of the witness is opinion, as opposed to fact. Broadly speaking, opinion testimony is a "belief, thought, or inference" drawn from a fact. *See Black's Law Dictionary* 579 (7th ed. 1999). Practically, however, labeling testimony as "fact" or "opinion," is often difficult "[w]here a witness is attempting to communicate the impressions made upon his senses by what he has perceived." 2 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 175 n.3 (6th ed. 2004) (quoting *Am. L. Inst. Model Code of Evidence*, Rule 401, Comment c.).

Recognizing the difficulty of labeling impressions of demeanor as fact or opinion, our Supreme Court has stated:

"The instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time, are, legally speaking, *matters of fact*, and are admissible in evidence."

2. N.C. Gen. Stat. § 8C-1, Rule 702(a) states:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

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State v. Lloyd, 354 N.C. 76, 109, 552 S.E.2d 596, 620 (2001) (emphasis added) (citation omitted) (testimony that defendant appeared calm is admissible). These types of instantaneous conclusions are usually referred to as “shorthand statements of facts,” and are not opinions subject to Rule 701.³ *State v. Braxton*, 352 N.C. 158, 187, 531 S.E.2d 428, 445 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001). Detective Kerley testified that he concluded that because McCloskey was breathing less hard, he must have been less nervous. That inference was an instantaneous conclusion as to mental state, and legally speaking, a matter of fact. *Lloyd*, 354 N.C. at 109, 552 S.E.2d at 620; *see also Braxton*, 352 N.C. at 187, 531 S.E.2d at 445 (holding that testimony that defendant appeared calm and relaxed was admissible as a shorthand statement of fact). However, when Detective Kerley went on to his second inference, that because McCloskey became less nervous he must have been telling the truth, the testimony crossed the line and became an opinion. *See State v. Heath*, 316 N.C. 337, 343, 341 S.E.2d 565, 569 (1986) (distinguishing between an “opinion” about a mental condition and a “opinion” about credibility). Such an inference is not, legally speaking, a matter of fact, and is subject to the limits on lay opinion testimony found in Rule 701. *Id.*

Third, we must determine if Detective Kerley’s lay opinion testimony is nonetheless admissible because it falls within the exception found in Rule 701. On this issue, our Supreme Court has determined that when one witness “vouch[es] for the veracity of another witness,” such testimony is an opinion which is not helpful to the jury’s determination of a fact in issue and is therefore excluded by Rule 701. *State v. Robinson*, 355 N.C. 320, 335, 561 S.E.2d 245, 255, *cert. denied*, 537 U.S. 1006, 154 L. Ed. 2d 404 (2002); *see also* N.C.P.L., Crim. 101.15 (2005) (The jury is the “sole judge[] of the credibility . . . of each witness,” and the jury should test the truthfulness of a witness by, among other things, observing “the manner and appearance of the witness.”); *State v. White*, 154 N.C. App. 598, 605, 572 S.E.2d 825, 831 (2002) (“The jury is charged with drawing its own conclusions from the evidence, and without being influenced by the conclusion of [a law enforcement officer].”)

Detective Kerley testified, “I don’t think he was quite breathing as hard. I mean, I can give you my impression of why [McCloskey] told

3. To illustrate the difficulty of labeling some testimony as opinion or fact, we note that in some cases, testimony determined to be a “shorthand statement of fact” is labeled an “opinion” which is nevertheless admissible because such testimony meets the exception found in Rule 701. *See, e.g., State v. Eason*, 336 N.C. 730, 747, 445 S.E.2d 917, 927 (1994), *cert. denied*, 513 U.S. 1096, 130 L. Ed. 2d 661 (1995).

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me the truth . . . I felt like he felt guilty about it and just wanted to get it out.” This is an opinion which vouches for the veracity of a witness. However, the jury was able to see for itself the manner and appearance of McCloskey when he testified, and determine for itself if it wanted to believe him. Therefore, the opinion as to his credibility was not helpful to the jury’s determination of a fact in issue. Accordingly, we hold that the admission of this testimony was error.

Having concluded that the admission of the testimony was error, we must determine whether the error was plain error. In other words, whether it was probable, absent this error, that the jury would have reached a different verdict than the one it actually reached. *Odom*, 307 N.C. at 661, 300 S.E.2d at 379. Though this case ultimately rested on whether the jury chose to believe the story of McCloskey or that of defendant, defendant’s credibility was impeached in many different ways: by the tape of her own voice seeking to mislead McCloskey into thinking that he was the father of her child and encouraging McCloskey to lie, by the testimony of Hooks and Lt. Lewis which revealed inconsistencies in defendant’s story, and by defendant’s own inconsistent testimony. Given the amount of testimony which directly or indirectly impeached defendant, the jury had ample evidence, besides the testimony of Detective Kerley, which might have caused it to disbelieve the story of defendant and believe the story of McCloskey. We find no plain error.

B. Testimony of Social Worker

[2] Defendant’s next assignment of error regards the following testimony of social worker Hooks during cross-examination by defendant.

Q: Ms. Goba!—Audrey Goba! complied with all your requests; is that correct? Well, strike that.

A: Technically, no. She didn’t tell us the truth from the very beginning. No.

Defendant contends that this testimony was improper character evidence which should not have been admitted.

Statements elicited by a defendant on cross-examination are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law. *State v. Greene*, 324 N.C. 1, 11, 376 S.E.2d 430, 437 (1989), *vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990); *see also State v. Chatman*, 308 N.C. 169, 177, 301 S.E.2d 71, 76 (1983) (holding that the defendant could not assign er-

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ror to testimony elicited during defense counsel's cross-examination of the State's witness); N.C. Gen. Stat. § 15A-1443(c) (2005). This assignment of error is without merit.

IV. Consecutive Sentences

[3] Finally, defendant argues that the trial court erred by sentencing her to consecutive terms of imprisonment for the two counts of first-degree sexual offense, because the constitutional guaranty against double jeopardy prohibits multiple sentences for a single offense.⁴ Defendant cites *dicta* in *State v. Petty*, 132 N.C. App. 453, 463, 512 S.E.2d 428, 434, *disc. review denied and appeal dismissed*, 350 N.C. 598, 537 S.E.2d 490 (1999), for the proposition that the two first-degree sexual offenses charged, cunnilingus and fellatio, are not disparate crimes, but merely alternative ways of showing the commission of a sexual act.⁵ Defendant reasons that if both cunnilingus and fellatio occur as part of a single transaction, then only one offense has been committed. Defendant contends that the events of 2 April 2004 were a single transaction and concludes that one offense has been committed, for which she can receive only one sentence.

Constitutional issues⁶ not raised and passed upon at trial will not be considered for the first time on appeal, *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001), not even for plain error, *State v. Cummings*, 352 N.C. 600, 613, 536 S.E.2d 36, 47 (2000). A "double

4. Defendant did not identify this issue in her assignments of error or brief as a double jeopardy question, but instead relied on cases addressing issues of jury unanimity, basing her argument only upon the contention that the two offenses arose out of a single transaction. We address this issue as a double jeopardy question, because "[t]he nature of the action is not determined by what either party calls it, but by the issues arising on the pleadings and by the relief sought." *Hayes v. Ricard*, 244 N.C. 313, 320, 93 S.E.2d 540, 545-46 (1956).

5. We note that the case *sub judice* does not involve any question of unanimity of the jury verdict, which was the specific issue addressed by *Petty* and *State v. Hartness*, 326 N.C. 561, 563-64, 391 S.E.2d 177, 178 (1990), the only cases upon which defendant based her argument. See *State v. Howell*, 169 N.C. App. 58, 62, 609 S.E.2d 417, 420 (2005) ("*Petty* . . . addressed whether a first-degree sexual offense is a single wrong for jury unanimity purposes and thus is inapposite" to the issue of multiplicitious charges for possession of child pornography.); see *State v. Lyons*, 330 N.C. 298, 303, 412 S.E.2d 308, 312 (1991) (*Hartness* and its line of cases "establish[] that if the trial court merely instructs the jury disjunctively as to various alternative acts *which will establish an element of the offense*, the requirement of unanimity is satisfied." (Emphasis in original.))

6. Defendant assigned error to the "multiplicitious indictment . . . in violation of [her] State and Federal rights." She further argued in her brief that "[t]he principle danger in multiplicity is that the defendant will receive multiple sentences for a single offense."

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jeopardy argument [need not] us[e] those exact words [to be preserved for appeal, if] the substance of the argument was sufficiently presented and, *more importantly, addressed by the trial court in finalizing its instructions to the jury.*" *State v. Ezell*, 159 N.C. App. 103, 106, 582 S.E.2d 679, 682 (2003) (emphasis added).

The trial transcript reads, in pertinent part:

THE COURT: [T]he substantive offenses are the two B1s of first-degree statutory sex offense. One would be as to cunnilingus; one would be as to fellatio, both with an aiding-and-abetting element. I don't know of any lesser included or any other subtleties. What do you-all say? It's either all or nothing, isn't it?" What says the state, and what says the defendant? Do you agree?

Defense Counsel: Your Honor, I think you got it on that.

. . .

THE COURT: The second full paragraph is where I first talk about the offenses, and you'll see as to each of the first two counts I talk about them being, one, cunnilingus, one fellatio, both by aiding and abetting. [The Court discusses the instructions step-by-step with counsel for each side.] [I]n the second count or charge, it's the very same charge except it talks—it says this one's in the form of fellatio. Otherwise, it's verbatim except the elements of fellatio instead of cunnilingus. [The Court continues step-by-step discussion.] What says defendant?

Defense Counsel: Your Honor, *we don't have any objection to the charge*—to the proposed charge . . . [a]nd *the verdict sheets seem to be okay.*

[The jury returns for closing arguments, is instructed, and retires to deliberate.]

THE COURT: Any further request, objections or anything from . . . the defendant?

[The jury deliberates and returns the verdict.]

Defense Counsel: Your Honor, the defendant at this time would ask the Court to set aside each and every verdict of the jury on the grounds that the verdicts . . . are not supported by sufficient evidence.

. . .

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THE COURT: I'll take that under advisement.

[The jury is dismissed, and sentencing begins.]

Defense Counsel: [W]e would ask the Court to be merciful. . . . It's a very sad situation. . . . *That's about all I have to say, Your Honor.*

. . . .

[Defense Counsel declines to be heard further on the motion to set aside the verdict.]

THE COURT: That motion [to set aside the verdict] is denied. The judgment of the Court is that with regard to . . . the jury finding . . . is th[at] defendant be imprisoned.

. . .

Defense Counsel: Your Honor, I would like to point out it all happened at one time.

THE COURT: I understand. I understand. [The Court reviews the verdicts and announces the sentences.]

Defendant's vague passing mention of this issue *after* the jury had been instructed, returned its verdict, and been dismissed from the courtroom is not sufficient to persuade us that defendant raised this constitutional issue to the trial court. Defendant has thus failed to preserve this assignment of error for appellate review. *See State v. Fullwood*, 343 N.C. 725, 733, 472 S.E.2d 883, 887 (1996), *cert. denied*, 520 U.S. 1122, 137 L. Ed. 2d 339 (1997). Defendant's final assignment of error is overruled.⁷

For the reasons stated above, we hold that the trial court did not commit plain error when it admitted Detective Kerley's testimony which tended to vouch for the veracity of McCloskey. We further hold

7. If defendant had properly preserved this issue for appeal, we would affirm the judgment and sentence of the trial court. Even when multiple sex acts occur in a "single transaction" or a short span of time, each act is a distinct and separate offense. *Compare State v. James*, 182 N.C. App. 698, 704-05, 643 S.E.2d 34, 38 (2007) (fondling the victim's breasts, performing oral sex on the victim, and forcing sexual intercourse on the victim were three separate and distinct offenses even when they occurred in a single episode), and *State v. Dudley*, 319 N.C. 656, 659, 356 S.E.2d 361, 363 (1987) (Each penetration, however slight, of the victim's vagina by the defendant's penis is a separate and distinct offense even when they occur in a single continuous incident.), with *State v. Laney*, 178 N.C. App. 337, 341, 631 S.E.2d 522, 524 (2006) (touching the breasts of the victim through her shirt and putting a hand inside the waistband of her pants amounts to only one offense).

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that defendant invited any error which she assigned to the testimony of Hooks, the social worker. Finally, we hold that defendant failed to preserve the constitutional question of double jeopardy for appellate review. Accordingly, defendant received a fair trial and her convictions are affirmed.

No Error.

Chief Judge MARTIN concurs.

Judge HUNTER concurring in part and dissenting in part in a separate opinion.

HUNTER, Judge, concurring in part and dissenting in part.

I agree with the majority that Audrey Gobal's ("defendant") trial was free from prejudicial error as it pertains to the admission of Detective Kerley's testimony and to the admission of Keisha Hooks's testimony. I disagree, however, with the majority's conclusion that the issue of sentencing is not properly before this Court. Instead, I would hold that the issue has been properly preserved for appellate review and that defendant's indictment was multiplicitous and would therefore vacate one of defendant's convictions for first degree sexual offense and remand for resentencing.

The majority bases its conclusion that the sentencing issue is not properly before this Court on the grounds that defendant did not raise the constitutional issue of double jeopardy to the trial court and, as such, has failed to preserve that argument for appellate review. Defendant, however, does not raise the issue of double jeopardy to this Court but instead argues that her indictment was multiplicitous.

The issues in this case are: (1) whether the issue of sentencing is properly before this Court; (2) whether the statutory definition of "sexual act" creates disparate offenses or whether it enumerates the methods by which the single wrong of engaging in a sexual act with a child may be shown; and (3) if the statutory definition of "sexual act" does not create disparate offenses, whether the acts of cunnilingus and fellatio committed by defendant against the victim occurred in the same transaction, thus rendering her indictment multiplicitous.

I.

The majority contends that defendant is making a double jeopardy argument and that it has been waived because it was not

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properly preserved.⁸ Defendant asserts in assignment of error number 6 that her indictment was multiplicitous. During the sentencing hearing, defense counsel made the substance of a multiplicity argument when he stated that the sexual acts “all happened at one time.” Accordingly, I would address defendant’s contention that her indictment was multiplicitous.

II.

In this case, the jury convicted defendant, *inter alia*, of two counts of first degree sexual offense in violation of N.C. Gen. Stat. § 14-27.4(a)(1) (2005), for which the trial court imposed consecutive sentences. A person will be guilty of a first degree sexual offense if the person engages in a *sexual act* “[w]ith a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim[.]” N.C. Gen. Stat. § 14.27.4(a)(1). A “sexual act” is defined as, *inter alia*, cunnilingus and fellatio. N.C. Gen. Stat. § 14.27.1(4) (2005). The State alleged that the two sexual acts committed by defendant, cunnilingus and fellatio, warrant two separate charges for first degree sexual offense. Defendant, however, argues that the alleged sexual acts of cunnilingus and fellatio occurred during the same transaction so that the State could only indict her on one count of first degree sexual offense.

An indictment will be multiplicitous if it charges a single offense in multiple counts. *State v. Petty*, 132 N.C. App. 453, 463 n.2, 512 S.E.2d 428, 435 n.2 (1999). As with the dangers guarded against by the double jeopardy clause, “ [t]he principal danger in multiplicity is that the defendant will receive multiple sentences for a single offense[.] ” *Id.* (quoting 2 Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 19.2, at 457-58 (1984)). Where an indictment is multipli-

8. Assuming, as the majority has, that defendant’s actual argument is one of double jeopardy, I disagree with the majority’s contention that the issue has been waived. The merits of a double jeopardy defense may be reviewed by an appellate court even where a defendant does not “us[e] those exact words,” so long as “the substance of the argument was sufficiently presented and, more importantly, addressed by the trial court in finalizing its instructions to the jury.” *State v. Ezell*, 159 N.C. App. 103, 106, 582 S.E.2d 679, 682 (2003). The substance of the argument was made when defense counsel said that the alleged sexual acts “all happened at one time”; the trial court instructed the jury on the double jeopardy issue when it told the jury “that for you to convict the defendant of more than one of the offenses charged *you must find that each offense constituted a separate and distinct criminal act, and you must weigh the evidence of each alleged offense separately and apart from any other.*” (Emphasis added.)

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cious, a defendant is not entitled to a dismissal of the indictment but will be entitled to relief from the improper sentence. *Id.*

A.

This Court has already stated that the “statutory definition of ‘sexual act’ does not create disparate offenses, rather it enumerates the methods by which the single wrong of engaging in a sexual act with a child may be shown.” *Petty*, 132 N.C. App. at 462, 512 S.E.2d at 434; *see also State v. Youngs*, 141 N.C. App. 220, 233, 540 S.E.2d 794, 802 (2000) (same). Accordingly, it has also been held that “disjunctive jury instructions do not risk nonunanimous verdicts in first-degree sexual offense cases.” *Petty*, 132 N.C. App. at 462, 512 S.E.2d at 434 (citing *State v. McCarty*, 326 N.C. 782, 784, 392 S.E.2d 359, 360 (1990) “(upholding jury instruction that the defendant could be found guilty of first-degree sexual offense ‘if [the jury] found [the] defendant [had] engaged in either fellatio or vaginal penetration’)”); *State v. Hartness*, 326 N.C. 561, 565, 391 S.E.2d 177, 179 (1990) (holding that disjunctive instructions did not result in a fatally ambiguous verdict in an indecent liberties case, and noting that the indecent liberties statute is “more similar to the statute relating to first-degree sexual offense . . . than to the trafficking statute discussed in *Diaz*”). It also then follows that because “first-degree sexual offense is a single wrong for unanimity purposes [it] requires us to conclude that charging a defendant with a separate count of first-degree sexual offense for each alternative sexual act performed in a single transaction would result in a multiplicitious indictment.”⁹ *Petty*, 132 N.C. App. at 463, 512 S.E.2d at 435 (footnote omitted). Thus, I would next determine whether the acts committed by defendant in this case occurred during the same transaction.

9. This Court, in *State v. James*, 182 N.C. App. 698, 704-05, 643 S.E.2d 34, 38 (2007), has reached a different conclusion as it pertains to the criminal violation of taking indecent liberties with a child. Although that Court was addressing a multiplicity argument, I would find it distinguishable from the instant case because *James* dealt with N.C. Gen. Stat. § 14-202.1(a)(1)-(2) (indecent liberties with children statute) and not N.C. Gen. Stat. § 14-27.4(a)(1) (first degree sexual offense statute). Moreover, the *James* Court, in rejecting the defendant’s multiplicity argument, applied a rule used to determine whether a double jeopardy violation had occurred where the same act or transaction constitutes a violation of *two distinct statutory provisions*, a rule that is inapplicable to the determination of whether an indictment was multiplicitious. *See James*, 182 N.C. App. at 704, 643 S.E.2d at 38 (citing *State v. Etheridge*, 319 N.C. 34, 50, 352 S.E.2d 673, 683 (1987)). Accordingly, I would find *James* distinguishable from the instant case on this ground as well.

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B.

In this case, the evidence presented at trial tended to show the acts of fellatio and cunnilingus occurred during the same transaction, and under the reasoning of *Petty*, I would hold that the indictment was multiplicitious. On 2 April 2004, defendant and her boyfriend, John Paul McCloskey (“McCloskey”), went into his bedroom with the victim. Once in the bedroom, McCloskey performed cunnilingus upon defendant. The victim then said, “ ‘I can take care of Mom from here,’ ” and she then began to masturbate defendant while McCloskey kissed defendant. McCloskey then performed cunnilingus upon defendant and the victim. The victim then performed fellatio on McCloskey for five or six minutes. There was a gap of approximately three to five minutes between the acts of cunnilingus and fellatio. During this time, there was no break in sexual acts between defendant and her boyfriend, and the victim remained nearby. Under these circumstances, I would hold that the sexual acts occurred during a single transaction. Accordingly, defendant’s indictment was multiplicitious because she was charged with two separate counts of first degree sexual offense in a single indictment when each alternative sexual act occurred during a single transaction. I would therefore vacate one of defendant’s convictions for first degree sexual offense and remand for resentencing.

III.

The majority has concluded that defendant’s argument is one of double jeopardy and not multiplicity. Due to the similarities between the two arguments, this Court has addressed them under the same standard. *See State v. Howell*, 169 N.C. App. 58, 61, 609 S.E.2d 417, 419 (2005). For the reasons discussed in footnote two of this dissent, I would address whether defendant was convicted in violation of the double jeopardy clause.

“Both the fifth amendment to the United States Constitution and article I, section 19 of the North Carolina Constitution *prohibit multiple punishments for the same offense* absent clear legislative intent to the contrary.”¹⁰ *Etheridge*, 319 N.C. at 50, 352 S.E.2d at 683 (emphasis added); *see also Ezell*, 159 N.C. App. at 106, 582 S.E.2d at 682 (same). “Our courts consider the ‘gravamen’ or ‘gist’ of the statute to determine whether it criminalizes a single wrong or multi-

10. The double jeopardy clause also “prohibits (1) a second prosecution for the same offenses after acquittal; [and] (2) a second prosecution for the same offense after conviction[.]” *Ezell*, 159 N.C. App. at 106, 582 S.E.2d at 682.

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ple discrete and separate wrongs.” *Petty*, 132 N.C. App. at 461, 512 S.E.2d at 434.

“Section 14-27.4’s gravamen, or gist, is to criminalize the performance of a sexual act with a child.” *Id.* at 462, 512 S.E.2d at 434. As stated above, “[t]he statutory definition of ‘sexual act’ does not create disparate offenses, rather it enumerates the methods by which the single wrong of engaging in a sexual act with a child may be shown.” *Id.* Accordingly, if defendant engaged in the sexual act in one transaction, then she could not be convicted on two counts of first degree sexual offense. On the other hand, if defendant engaged “in alternative sexual acts in separate transactions . . . each separate transaction may properly form the basis for charging the defendant with a separate count of first-degree sexual offense.” *Id.* at 463, 512 S.E.2d at 435.

For the reasons discussed in section IIB of this dissent, I would find that the acts of cunnilingus and fellatio occurred during a single transaction. Accordingly, defendant was convicted twice for a single offense in violation of the double jeopardy clause, and I would remand with instructions to vacate one first degree sexual offense conviction and to resentence defendant.

IV.

In summary, I would hold that defendant’s indictment was multiplicitous and would remand for resentencing on that ground. In the alternative, I would hold that the issue of double jeopardy is properly before this Court and that defendant’s convictions on two counts of a first degree sexual offense arising out of the same transaction violated the double jeopardy clause and would thus vacate one conviction and remand for resentencing. For the foregoing reasons, I respectfully dissent as to these issues.

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DELMA BLINSON, JERRY R. JOHNSON, KELLIENE FISHER, DONALD R. REID, BRIAN GOSSAGE, WILFORD R. DOWE, AND KENT MISEGADES, PLAINTIFFS v. STATE OF NORTH CAROLINA; JAMES T. FAIN, III, SECRETARY OF THE N.C. DEPT. OF COMMERCE, IN HIS OFFICIAL CAPACITY; CITY OF WINSTON-SALEM, NORTH CAROLINA AND ALLEN JOINES, MAYOR OF WINSTON-SALEM, IN HIS OFFICIAL CAPACITY; FORSYTH COUNTY, NORTH CAROLINA AND GLORIA D. WHISENHUNT, CHAIRPERSON OF THE BOARD OF COMMISSIONERS OF FORSYTH COUNTY, IN HER OFFICIAL CAPACITY; THE MILLENNIUM FUND; WINSTON-SALEM BUSINESS, INC.; THE WINSTON-SALEM ALLIANCE; AND DELL, INC., DEFENDANTS

No. COA06-1258

(Filed 16 October 2007)

1. Constitutional Law— standing to challenge business incentives—increased tax burden

Plaintiffs' status as taxpayers who suffered an increased tax burden from incentives given for locating a computer manufacturing facility in North Carolina was sufficient to provide standing for claims under the Public Purpose and Exclusive Emoluments Clauses of the North Carolina Constitution.

2. Constitutional Law— standing to challenge business incentives—no showing of membership in prejudiced class

Plaintiffs lacked standing to bring claims under the Uniformity of Taxation Clause of the North Carolina Constitution and the Dormant Commerce Clause of the United States Constitution challenging incentives given for locating a computer manufacturing facility in North Carolina. Plaintiffs have not demonstrated that they belong to a class prejudiced by the operation of the legislation.

3. Constitutional Law— business incentives—Public Purpose Clauses—failure to state a claim

The trial court did not err by concluding that plaintiffs failed to state a claim for relief under the Public Purpose Clauses of the North Carolina Constitution in an action opposing incentives given to a computer company for locating a manufacturing facility in North Carolina. Plaintiffs' complaint focused exclusively on the purported benefits provided to the company and contained no allegations that the legislative bodies were not acting with a motivation to increase the tax base or alleviate unemployment and fiscal distress.

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4. Constitutional Law— business incentives—Exclusive Emoluments

The trial court did not err by concluding that plaintiffs failed to state a claim for relief under the Exclusive Emoluments Clause of the North Carolina Constitution in an action challenging incentives given to a computer company to locate a manufacturing facility in North Carolina. The incentives and subsidies in this case are intended to promote the general economic welfare of the communities involved rather than to solely benefit the company, and do not amount to exclusive emoluments.

Appeal by plaintiffs from order entered 12 May 2006 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 25 April 2007.

North Carolina Institute for Constitutional Law, by Robert F. Orr, Pamela B. Cashwell, and Jeanette Doran Brooks, for plaintiffs-appellants.

Attorney General Roy Cooper, by Special Deputy Attorney General Norma S. Harrell and Assistant Solicitor General John F. Maddrey, for State defendants-appellees.

Kilpatrick Stockton LLP, by J. Robert Elster, Adam H. Charnes, and Stephen T. Inman; Winston-Salem City Attorney Ronald G. Seeber; and Forsyth County Attorney Davida W. Martin; for defendants-appellees City of Winston-Salem, Allen Joines, Forsyth County, Gloria D. Whisenhunt, The Millenium Fund, Winston-Salem Business, Inc., and The Winston-Salem Alliance.

Womble Carlyle Sandridge & Rice, PLLC, by Burley B. Mitchell, Jr., Pressly M. Millen, Sean E. Andrussier, and Melody Ray-Welborn; and Jones Day, by Michael A. Carvin; for defendant-appellee Dell, Inc.

GEER, Judge.

“Today, every state provides tax and other economic incentives as an inducement to local industrial location and expansion.” Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 Cornell L. Rev. 789, 790 (1996). In a reprise of *Maready v. City of Winston-Salem*, 342 N.C. 708, 467 S.E.2d 615 (1996), plaintiffs challenge incentives—provided by the

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General Assembly and defendants City of Winston-Salem and Forsyth County—that benefitted defendant Dell, Inc. when it constructed a computer manufacturing facility in Forsyth County.

Whether these incentives are lawful under the North Carolina Constitution was settled by *Maready* and this Court's subsequent decision in *Peacock v. Shinn*, 139 N.C. App. 487, 533 S.E.2d 842, *appeal dismissed and disc. review denied*, 353 N.C. 267, 546 S.E.2d 110 (2000). We are not free to revisit the reasoning or holdings of those opinions. To the extent plaintiffs question the wisdom of the incentives and whether they will in fact provide the public benefit promised, they have sought relief in the wrong forum. Once the Supreme Court held in *Maready* that economic incentives to recruit business to North Carolina involve a proper public purpose, it became the role of the General Assembly and the Executive Branch—and not the courts—to determine whether such incentives are sound public policy. We are bound by *Maready* and *Peacock* and, therefore, affirm the trial court's decision dismissing plaintiffs' complaint.

Facts

The facts of this case are largely undisputed. In November 2004, the Legislature amended Articles 3A, 3G, 5, and 9 of Chapter 105 of the North Carolina General Statutes to enhance existing tax incentives and to provide a tax credit for certain major computer manufacturing facilities (the "Computer Legislation"). 2004 N.C. Sess. Laws 204. The General Assembly made the following findings regarding its purpose in enacting the Computer Legislation:

- (1) It is the policy of the State to stimulate economic activity and to create and maintain sustainable jobs for the citizens of the State in strategically important industries.
- (2) Both short-term and long-term economic trends at the regional, State, national, and international levels have made the successful implementation of the State's economic development policies and programs both more critical and more challenging; in particular, national trade policies and the resulting impact on domestic competitiveness have made the retention of manufacturing jobs more difficult at a time of transition in the national, State, and regional economics.
- (3) Manufacturing employment in the State has been disproportionately affected by trade policies and global economic

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trends, resulting in the loss of jobs by many in the State's capable industrial workforce.

- (4) Computer manufacturing and distribution has been an important industry for the State and has prospered in this State due to our strong and productive workforce, focused worker training programs, research capabilities, tradition of innovation, and concentration of companies.
- (5) The computer manufacturing and distribution industry will remain a vital part of the world's, nation's, and State's future economy as society becomes more dependent on advanced computer technology.
- (6) It is the intent of the State to encourage the sustainability of this industry cluster in this State and to encourage the maintenance and growth of computer manufacturing and distribution employment in the State through tax policies, investments in training capacity, and other policies and programs.
- (7) The State must be an innovative leader in creating policies and programs that encourage the maintenance of manufacturing jobs in this country and State and in the development of efforts to support manufacturers during the transitional period as they adapt to rapidly changing global conditions.

2004 N.C. Sess. Laws 204, § 1.

Following these amendments, Dell announced plans to build a major computer manufacturing facility in the Piedmont Triad region. In December 2004, the Forsyth County Board of Commissioners passed a resolution (the "County Resolution") authorizing Forsyth County's participation in an economic development incentives project to assist defendant Dell and defendant Winston-Salem Business, Inc. ("WSBI") with the location of Dell's manufacturing facility in the Alliance Science and Technology Park in Forsyth County. Subsequently, the City Council of Winston-Salem also passed a variety of resolutions (the "City Resolutions") pertaining to the project, addressing matters such as zoning, financial assistance, annexation, and the sale of land to Dell.

Defendants Dell, the City of Winston-Salem, Forsyth County, WSBI, The Millennium Fund, and the Winston-Salem Alliance entered into an agreement on 26 July 2005 (the "Agreement") setting out Dell's plans to locate its facility in the Alliance Science and Technology

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Park and the various local economic development incentives that would be provided. Like the Computer Legislation, the Agreement recited various public benefits expected to flow from the incentives being provided to Dell, including:

- A. The Community is vitally interested in the economic welfare of its citizens and the creation and maintenance of sustainable jobs for its citizens in strategically important industries and therefore wishes to provide the necessary conditions to stimulate investment in the local economy and promote business, resulting in the creation of a substantial number of jobs at competitive wages, and to encourage economic growth and development opportunities which the Community has determined will be made possible pursuant to the Project (as defined below).
- B. [Dell] is engaged in state-of-the-art computer manufacturing and distribution and is a premier provider of products and services required for customers worldwide to build their information-technology and Internet infrastructures. The Company is the only major manufacturer of computers that has chosen to keep its manufacturing operations within the United States, and has been able to do so in large part based upon its reliance upon a unique supply chain system under which key suppliers, partners and service vendors . . . are located in the immediate vicinity of [Dell's] manufacturing operations, which enables just-in-time, custom-configured production.
- C. [Dell] has proposed to make a capital investment of at least \$100 million at the Site in the form of a computer manufacturing and distribution facility. . . . [Dell] expects that the Project will include taxable buildings and equipment having an initial aggregate taxable value of at least \$100 million and expects to create at least 1,700 local Qualified Jobs . . . at an average wage of \$28,000 per year.
- D. The Community recognizes that the Project will bring direct and indirect benefits to the City and the County, including job creation, economic diversification and stimulus and training in technology, computer assembly and manufacturing skills, and has offered economic development incentives . . . to induce [Dell] to locate the Project at the Site.

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- E. [Dell] fully intends to establish, through the Project, an important presence in the City and the County by employing a large number of local employees and making a substantial investment in the Project and in the training and development of those employees. . . .

On 23 June 2005, while Dell's manufacturing facility was being built, the seven plaintiffs filed a 22-count complaint in Wake County Superior Court, asserting that the Computer Legislation, the County Resolution, the City Resolutions, and the Agreement violated various provisions of the federal and state constitutions. Plaintiffs filed an amended complaint on 9 September 2005.

In October 2005, defendants filed motions to dismiss under N.C.R. Civ. P. 12(b)(1) for lack of standing and under N.C.R. Civ. P. 12(b)(6) for failure to state a claim for relief. Defendants' motions were heard by Judge Robert H. Hobgood and on 12 May 2006, the trial court entered an order dismissing all of plaintiffs' claims, concluding that plaintiffs lacked standing and had failed to state a claim for relief. Plaintiffs timely appealed to this Court.

Discussion

On appeal, plaintiffs have pursued only five of the claims asserted in their amended complaint. They argue that the trial court erred in dismissing their claims that the disputed incentives and subsidies: (1) violated the "public purpose" doctrine embodied in N.C. Const. art. V, § 2(1) & (7); (2) were "exclusive emoluments" in violation of N.C. Const. art. I, § 32; (3) were unauthorized local development under N.C. Gen. Stat. § 158-7.1 (2005); (4) were not uniformly applicable as required by N.C. Const. art. V, § 2(2) & (3); and (5) discriminated against interstate commerce in violation of the Dormant Commerce Clause embodied in U.S. Const. art. I, § 8, cl. 3. We must determine whether plaintiffs had standing to bring each claim and whether those counts of their amended complaint assert a claim for relief.

I. Standing

[1] The trial court concluded that plaintiffs lacked standing to bring each of the above claims. As the party invoking jurisdiction, plaintiffs have the burden of proving the elements of standing. *Coker v. DaimlerChrysler Corp.*, 172 N.C. App. 386, 391, 617 S.E.2d 306, 310 (2005), *aff'd per curiam*, 360 N.C. 398, 627 S.E.2d 461 (2006). "If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim." *Estate of Apple v. Commercial*

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Courier Express, Inc., 168 N.C. App. 175, 177, 607 S.E.2d 14, 16, *disc. review denied*, 359 N.C. 632, 613 S.E.2d 688 (2005). Consequently, standing is properly challenged by a Rule 12(b)(1) motion to dismiss. *Peninsula Prop. Owners Ass'n v. Crescent Res., LLC*, 171 N.C. App. 89, 93, 614 S.E.2d 351, 354, *appeal dismissed and disc. review denied*, 360 N.C. 177, 626 S.E.2d 648 (2005). We review de novo a trial court's decision to dismiss a case under N.C.R. Civ. P. 12(b)(1) for lack of standing. *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001).

Plaintiffs contend that their status as taxpayers, suffering an increased tax burden as a result of the Dell incentives, is sufficient to provide plaintiffs with standing. Defendants concede that, under our Supreme Court's recent decision in *Goldston v. State*, 361 N.C. 26, 637 S.E.2d 876 (2006), plaintiffs have standing to bring their claims under the Public Purpose and Exclusive Emoluments Clauses of the North Carolina Constitution. We agree and hold that the trial court erred in dismissing those claims for lack of standing.

[2] Defendants maintain that plaintiffs nonetheless lack standing to bring their discrimination-based claims under the Uniformity of Taxation Clauses of the North Carolina Constitution and the Dormant Commerce Clause of the United States Constitution. As a general rule, "[a] taxpayer, as such, does not have standing to attack the constitutionality of any and all legislation." *Nicholson v. State Educ. Assistance Auth.*, 275 N.C. 439, 447, 168 S.E.2d 401, 406 (1969). In the context of constitutional issues, "[t]he gist of the question of standing is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" *Goldston*, 361 N.C. at 30, 637 S.E.2d at 879 (alterations in original) (internal quotation marks omitted) (quoting *Stanley v. Dep't of Conservation & Dev.*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973)).

Plaintiffs' claims that the Computer Legislation violates the Uniformity of Taxation Clauses and the Federal Dormant Commerce Clause do not relate to any injury plaintiffs themselves have sustained. Rather, plaintiffs' claims under these provisions pertain only to a theoretical injury that might be suffered by other businesses that may attempt to compete with Dell. In other words, plaintiffs lack any "personal stake in the outcome of the controversy" with respect to

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their challenges under these provisions. *Id.* (quoting *Stanley*, 284 N.C. at 28, 199 S.E.2d at 650).

This Court has previously concluded that in order to establish standing to challenge a statute under the Uniformity of Taxation Clauses, plaintiffs must demonstrate that they “ ‘belong[] to the class which is prejudiced by the statute.’ ” *In re Appeal of Barbour*, 112 N.C. App. 368, 373, 436 S.E.2d 169, 173 (1993) (quoting *In re Appeal of Martin*, 286 N.C. 66, 75, 209 S.E.2d 766, 773 (1974)). Similarly, it is well-established under federal law that claims under the Dormant Commerce Clause require plaintiffs to demonstrate that they are prejudiced by the operation of the challenged statute in order to establish standing. *See, e.g., Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 286, 136 L. Ed. 2d 761, 772, 117 S. Ct. 811, 818 (1997) (holding that, to establish standing to challenge state tax law under Dormant Commerce Clause, plaintiffs must demonstrate “cognizable injury”).

Plaintiffs have not demonstrated that they belong to a class that is prejudiced by the operation of the Computer Legislation. Accordingly, we hold the trial court properly concluded that plaintiffs lack standing to bring their claims under both the Uniformity of Taxation Clauses and the Dormant Commerce Clause.

II. Motions to Dismiss

We next address whether the trial court erred in dismissing, pursuant to Rule 12(b)(6), plaintiffs’ claims pursuant to the Public Purpose and Exclusive Emoluments Clauses of the North Carolina Constitution. When a party files a motion to dismiss pursuant to Rule 12(b)(6), the question for the court is whether the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not. *Grant Constr. Co. v. McRae*, 146 N.C. App. 370, 373, 553 S.E.2d 89, 91 (2001). The appellate court conducts a de novo review of the pleadings to determine their legal sufficiency and decide whether the trial court’s ruling on the motion to dismiss was erroneous. *Whitehurst v. Hurst Built, Inc.*, 156 N.C. App. 650, 653, 577 S.E.2d 168, 170 (2003).

A. The Public Purpose Clauses

[3] In asserting their claims that the Computer Legislation and the local incentives lacked a public purpose, plaintiffs rely upon two clauses of the North Carolina Constitution. First, N.C. Const. art. V, § 2(1) provides that “[t]he power of taxation shall be exercised in a

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just and equitable manner, *for public purposes only*, and shall never be surrendered, suspended, or contracted away.” (Emphasis added.) Second, N.C. Const. art. V, § 2(7) provides that “[t]he General Assembly may enact laws whereby the State, any county, city or town, and any other public corporation may contract with and appropriate money to any person, association, or corporation for the accomplishment of *public purposes only*.” (Emphasis added.)

With respect to determining whether legislation serves a public purpose within the meaning of these two constitutional clauses:

the presumption favors constitutionality. Reasonable doubt must be resolved in favor of the validity of the act. The Constitution restricts powers, and powers not surrendered inhere in the people to be exercised through their representatives in the General Assembly; therefore, so long as an act is not forbidden, its wisdom and expediency are for legislative, not judicial, decision.

Maready, 342 N.C. at 714, 467 S.E.2d at 619 (internal citations omitted). Nevertheless, although legislative declarations are accorded great weight, the ultimate responsibility for the determination of what constitutes a public purpose rests with the judiciary. *Id.* at 716, 467 S.E.2d at 620. In fulfilling that responsibility, we may consider the text of the Computer Legislation, the County and City Resolutions, and the Agreement, even though we are reviewing a Rule 12(b)(6) order of dismissal, because plaintiffs attached copies of these documents to their amended complaint. *See Peacock*, 139 N.C. App. at 494, 533 S.E.2d at 847.

Any consideration of the constitutionality of economic development incentives must start with the Supreme Court’s decision in *Maready*. The lawsuit in *Maready* “challenge[d] twenty-four economic development incentive projects entered into by the City [of Winston-Salem] or [Forsyth] County pursuant to N.C.G.S. § 158-7.1.” 342 N.C. at 713, 467 S.E.2d at 618-19. The disputed expenditures included several million dollars given directly to private companies, primarily in the form of reimbursement for “on-the-job training, site preparation, facility upgrading, and parking.” *Id.*, 467 S.E.2d at 619. In addition, the expenditures included road construction, financing of land purchases, and even spousal relocation assistance. *Id.* at 737, 467 S.E.2d at 633 (Orr, J., dissenting).

To determine whether N.C. Gen. Stat. § 158-7.1, which authorized these local incentives, violated the Public Purpose Clauses, the

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Maready Court applied the test set out in *Madison Cablevision, Inc. v. City of Morganton*, 325 N.C. 634, 386 S.E.2d 200 (1989). *Madison Cablevision* established two guiding principles for determining whether a particular undertaking was done for a public purpose: “(1) it involves a reasonable connection with the convenience and necessity of the particular municipality; and (2) the activity benefits the public generally, as opposed to special interests or persons.” *Id.* at 646, 386 S.E.2d at 207 (internal citation omitted).

Maready concluded that economic development incentives authorized by N.C. Gen. Stat. § 158-7.1 satisfied the first prong of the test because “[e]conomic development has long been recognized as a proper governmental function.” 342 N.C. at 723, 467 S.E.2d at 624. With respect to the second prong, *Maready* observed that “an expenditure does not lose its public purpose merely because it involves a private actor. Generally, if an act will promote the welfare of a state or a local government and its citizens, it is for a public purpose.” *Id.* at 724, 467 S.E.2d at 625 (emphasis added).

Applying this test, the Court held that, under *Madison Cablevision*, “section 158-7.1 clearly serves a public purpose.” *Id.* Specifically, the Court concluded that:

The public advantages are not indirect, remote, or incidental; rather, they are directly aimed at furthering the general economic welfare of the people of the communities affected. While private actors will necessarily benefit from the expenditures authorized, such benefit is merely incidental. It results from the local government’s efforts to better serve the interests of its people.

Id. at 725, 467 S.E.2d at 625-26. The Court explained further:

The General Assembly thus could determine that legislation such as N.C.G.S. § 158-7.1, which is intended to alleviate conditions of unemployment and fiscal distress and to increase the local tax base, serves the public interest. New and expanded industries in communities within North Carolina provide work and economic opportunity for those who otherwise might not have it. This, in turn, creates a broader tax base from which the State and its local governments can draw funding for other programs that benefit the general health, safety, and welfare of their citizens. The potential impetus to economic development, which might otherwise be lost to other states, likewise serves the public interest.

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Id. at 727, 467 S.E.2d at 627. The Court then concluded: “We therefore hold that N.C.G.S. § 158-7.1, *which permits the expenditure of public moneys for economic development incentive programs*, does not violate the public purpose clause of the North Carolina Constitution.” *Maready*, 342 N.C. at 727, 467 S.E.2d at 67 (emphasis added). We can find no meaningful distinction between the present case and *Maready*.

With respect to the County and City Resolutions and the Agreement, the incentives and subsidies embodied therein were adopted by Winston-Salem and Forsyth County pursuant to N.C. Gen. Stat. § 158-7.1. Plaintiffs have made no attempt to demonstrate how the incentives in this case are legally different from the 24 local economic incentive packages offered in *Maready* pursuant to § 158-7.1.¹ Although plaintiffs argue that *Maready* decided only the facial constitutionality of N.C. Gen. Stat. § 158-7.1, they provide no theory under which economic development incentives properly adopted under § 158-7.1—a statute held to be consistent with the Public Purpose Clauses when it authorized local government to adopt such incentive programs—would nonetheless be unconstitutional as violative of the Public Purpose Clauses. In the absence of a showing of some distinction between the incentives in this case and the incentives in the *Maready* case, we hold that the trial court properly concluded that the County and City Resolutions and the Agreement did not violate the Public Purpose Clauses.

With respect to the Computer Legislation, we first note that *Maready* explicitly stated that, consistent with the Public Purpose Clauses, “[t]he General Assembly may provide for, *inter alia*, roads, schools, housing, health care, transportation, and occupational training. It would be anomalous to now hold that a government which

1. Plaintiffs did assert a claim in their amended complaint that the local incentives in this case violated N.C. Gen. Stat. § 158-7.1, and they purport to pursue that claim on appeal. With respect to that claim, however, plaintiffs’ amended complaint states only that the “tax credits, direct grants, and other subsidies authorized and/or granted to Dell by the City, the County, the State of North Carolina, and the agents thereof are not authorized by . . . N.C. Gen. Stat. § 158-7.1.” Plaintiffs’ amended complaint fails to allege any specific facts that would indicate a violation of N.C. Gen. Stat. § 158-7.1. Moreover, plaintiffs’ appellate brief neither directs this Court to what specific aspects of the incentives they contend run afoul of the statute nor cites any authority in support of this claim. “Assignments of error not set out in the appellant’s brief, *or in support of which no reason or argument is stated or authority cited*, will be taken as abandoned.” N.C.R. App. P. 28(b)(6) (emphasis added). We, therefore, deem plaintiffs’ contentions under N.C. Gen. Stat. § 158-7.1 abandoned and affirm the trial court’s dismissal of that claim.

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expends large sums to alleviate the problems of its citizens through multiple humanitarian and social programs is proscribed from promoting the provision of jobs for the unemployed, an increase in the tax base, and the prevention of economic stagnation.” 342 N.C. at 722, 467 S.E.2d at 624. Thus, under *Maready*, the need to offer economic incentive programs to attract industry that will replace lost jobs is necessarily a public purpose. Here, the General Assembly’s legislative findings express its determination that North Carolina must make an effort to transition from our traditional manufacturing base—which has sustained a substantial loss of jobs to overseas competition—to a more modern manufacturing base, such as computer manufacturing, that will likely grow in the future. *See* 2004 N.C. Sess. Laws 204, § 1. These findings fall squarely within the public purposes identified in *Maready*.

Moreover, *Maready* quoted favorably the prescient dissent of former Chief Justice Parker:

“North Carolina is no longer a predominantly agricultural community. We are developing from an agrarian economy to an agrarian and industrial economy. North Carolina is having to compete with the complex industrial, technical, and scientific communities that are more and more representative of a nation-wide trend. All men know that in our efforts to attract new industry we are competing with inducements to industry offered through legislative enactments in other jurisdictions as stated in the legislative findings and purposes of this challenged Act. It is manifest that the establishment of new industry in North Carolina will enrich a whole class of citizens who work for it, will increase the per capita income of our citizens, will mean more money for the public treasury, more money for our schools and for payment of our school teachers, more money for the operation of our hospitals like the John Umstead Hospital at Butner, and for other necessary expenses of government. This to my mind is clearly the business of government in the jet age in which we are living. Among factors to be considered in determining the effect of the challenged legislation here is the aggregate income it will make available for community distribution, the resulting security of their [sic] income, and the opportunities for more lucrative employment for those who desire to work for it.”

342 N.C. at 727, 467 S.E.2d at 627 (quoting *Mitchell v. N.C. Indus. Dev. Fin. Auth.*, 273 N.C. 137, 164, 159 S.E.2d 745, 764 (1968) (Parker,

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C.J., dissenting)). As the General Assembly's findings with respect to the Computer Legislation reflect precisely the same concerns, we find this quote as applicable here as it was in *Maready*. We are bound by *Maready* and, therefore, may not now hold that the concerns that formed a basis for the Computer Legislation do not constitute a public purpose.

Plaintiffs nevertheless argue that the Computer Legislation is "directly and exclusively" for Dell's benefit, and, as a result, fails the second prong of *Madison Cablevision*. Similarly, plaintiffs' amended complaint asserts that the Computer Legislation is not for a public purpose because it provides "direct government subsidies for a private business enterprise." While we do not read the legislation as narrowly as plaintiffs, we note nonetheless that the challenged benefits in *Maready* also went to specific companies. *Id.* at 713, 467 S.E.2d at 618-19.

Plaintiffs' argument also cannot be reconciled with *Peacock*, in which this Court considered whether two agreements between the Charlotte Convention Center Authority and various parties representing the Charlotte Hornets basketball team were unconstitutional when the agreements required the Authority to pay directly to specific private parties a percentage of the revenue generated by the Coliseum. 139 N.C. App. at 489-92, 533 S.E.2d at 844-46. We concluded that those payments were indeed for "public purposes" and, as in *Maready*, noted that the mere fact that the agreements benefitted private parties was not dispositive: "[T]he fact that a private individual benefits from a particular municipal transaction is insufficient to make out a claim under [N.C. Const. art.] V, § 2. Rather, the test is whether the transaction will promote the welfare of the local government and results from the local government's efforts to better serve the interests of its people." *Id.* at 494, 533 S.E.2d at 847-48 (internal citation omitted). See also *Piedmont Triad Airport Auth. v. Urbine*, 354 N.C. 336, 343, 554 S.E.2d 331, 335 (2001) (concluding legislative condemnation of private property that would be used to construct Federal Express facility was nevertheless a condemnation for a "public use" because "[t]he arrangement advances the primary goal of giving effect to the people's general desire for better seaports and airports"), *cert. denied*, 535 U.S. 971, 152 L. Ed. 2d 381, 122 S. Ct. 1438 (2002).

Finally, plaintiffs' arguments reflect a misunderstanding of the public purpose doctrine. The task of the judiciary is to determine whether the *aim* of the legislation is primarily public and not to

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weigh the public benefit against the private benefit by making findings as to the projected monetary value of each. Indeed, the approach urged by plaintiffs was the approach of the dissent in *Maready*. See *Maready*, 342 N.C. at 736, 467 S.E.2d at 632. We do not “pass upon the wisdom or propriety of legislation in determining *the primary motivation* behind a statute” *Id.* at 725, 467 S.E.2d at 626 (emphasis added). We look instead to whether the purpose of “an act will promote the welfare of a state or a local government and its citizens,” *id.* at 724, 467 S.E.2d at 625, and do not engage in economic projections as to the potential monetary benefits resulting from the legislation. The latter analyses are for the General Assembly and the Executive Branch, which can also take into account non-monetary benefits.

In short, to put forth a claim for relief, plaintiffs were required to plead facts demonstrating that the motivation, aim, or intent of the Computer Legislation, the County and City Resolutions, and the Agreement was not a public one. Plaintiffs’ complaint contains no allegations suggesting that the legislative bodies were not acting with a motivation to increase the tax base or alleviate unemployment and fiscal distress. Rather, their complaint focuses exclusively on the various purported benefits provided to Dell. *Maready* determined, however, that “an expenditure does not lose its public purpose merely because it involves a private actor.” *Id.* We hold, therefore, that the trial court did not err, under *Maready* and *Peacock*, in concluding that plaintiffs failed to state a claim for relief under the Public Purpose Clauses of the North Carolina Constitution.

III. The Exclusive Emoluments Clause

[4] Plaintiffs next argue that the trial court erred by concluding they had failed to state a claim that the Computer Legislation and the County and City Resolutions ran afoul of the Exclusive Emoluments Clause. Under this provision, “[n]o person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services.” N.C. Const. art. I, § 32. “An emolument is defined as ‘[t]he profit arising from office, employment, or labor; that which is received as a compensation for services, or which is annexed to the possession of office as salary, fees, and perquisites.’” *Crump v. Snead*, 134 N.C. App. 353, 356, 517 S.E.2d 384, 387 (quoting *Black’s Law Dictionary* 524 (6th ed. 1990)), *disc. review denied*, 351 N.C. 101, 541 S.E.2d 143 (1999).

Our Supreme Court has held that not every classification that favors a particular group of persons is an “‘exclusive or separate

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emolument[] or privilege[]' " within the meaning of the constitutional prohibition. *Town of Emerald Isle v. State*, 320 N.C. 640, 652, 360 S.E.2d 756, 764 (1987) (quoting N.C. Const. art. I, § 32). Exemptions in favor of a specific group of persons are not an exclusive emolument or privilege if: "(1) the exemption is intended to promote the general welfare rather than the benefit of the individual, and (2) there is a reasonable basis for the legislature to conclude the granting of the exemption serves the public interest." *Id.* at 654, 360 S.E.2d at 764. Although the Supreme Court's language in *Emerald Isle* refers only to "exemptions," this Court has applied *Emerald Isle* with equal force to affirmative "benefits." *See Crump*, 134 N.C. App. at 357, 517 S.E.2d at 387 (inserting phrase "[or benefit]" into *Emerald Isle* test and applying *Emerald Isle* to hold that legislatively conferred longer terms and additional pay for city council members were not exclusive emoluments).

In *Peacock*, this Court held that when legislation is determined to "promote the public benefit" under the Public Purpose Clauses, it necessarily is not an exclusive emolument. 139 N.C. App. at 496, 533 S.E.2d at 848. As discussed above, the incentives and subsidies provided to Dell are intended to promote the general economic welfare of the communities involved, rather than to solely benefit Dell, and, accordingly, do not amount to exclusive emoluments.

Plaintiffs nevertheless urge us to consider whether the disputed incentives and subsidies are "in consideration of 'public services.'" *See Leete v. County of Warren*, 341 N.C. 116, 118, 462 S.E.2d 476, 478 (1995) (noting Exclusive Emoluments Clause "precludes exclusive or separate emoluments except 'in consideration of public services'" (quoting N.C. Const. art. I, § 32)). That issue only arises once a court has determined that an exemption or benefit constitutes an exclusive emolument. As we have concluded that the disputed incentives and subsidies were not exclusive emoluments, it is immaterial whether they were provided "in consideration of public services." Consequently, the trial court did not err in concluding that plaintiffs failed to state a claim for relief under the Exclusive Emoluments Clause.

Conclusion

In sum, we agree with the trial court that plaintiffs lacked standing under the state Uniformity of Taxation Clauses and the federal Dormant Commerce Clause, but hold that the trial court erred in concluding that plaintiffs lacked standing to bring their claims under the

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Public Purpose and Exclusive Emoluments Clauses. As to those claims, however, we hold that the trial court properly concluded that plaintiffs had failed to state a claim for relief under these provisions and, therefore, affirm.

Affirmed.

Judges WYNN and ELMORE concur.

STATE OF NORTH CAROLINA v. HENRI NAVOTHLY YOUNG

No. COA06-1247

(Filed 16 October 2007)

1. Appeal and Error— items not included in motion to suppress at trial—admission not challenged on appeal

A murder defendant whose motion to suppress a statement to officers did not include the earlier recovery of his guns could not challenge the admission of those guns on appeal.

2. Confessions and Incriminating Statements— timing of waiver of rights—question of fact

Where the dispute in the admission of defendant's statements to officers was the point at which defendant waived his rights and not whether he was in custody or made the statements voluntarily, the question is one of fact, not law, and review is limited to whether the findings are supported by the evidence.

3. Confessions and Incriminating Statements— findings— timing of invocation of rights

The trial court did not err by denying defendant's motion to suppress his statements to the police where he contended that the court's findings failed to resolve the issue of whether he invoked his rights before being interrogated by the police. The findings demonstrated the sequence of events in which defendant was questioned by the police and found specifically that defendant was not questioned about this killing until after he waived his rights.

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4. Confessions and Incriminating Statements— findings— no interrogation prior to waiver of rights—supported by evidence

Testimony from detectives supported findings that the police did not interrogate defendant prior to his waiver of his Miranda rights. The trial court chose to believe the detectives' rendition of the facts, rather than defendant's assertion that a supplemental report reflected the order in which he was questioned.

5. Constitutional Law— effective assistance of counsel—not moving to suppress test results

Defense counsel was not ineffective in not moving to suppress the results of gun tests obtained through trickery. The trial court would have denied the motion if made; defendant voluntarily delivered his guns to police, despite the trickery, and the hope for relief from criminal charges (assuming that engendering hope is improper) involved unrelated charges. Moreover, the detectives upheld their agreement.

6. Sentencing— felony murder—arrest of one of two underlying charges

The trial court did not err by not arresting both judgments on the felonies underlying felony murder, but should have arrested one.

7. Evidence— letters—authentication—circumstances

Familiarity with handwriting is not the only way to authenticate a letter and the trial court here did not err by admitting letters attributed to defendant by a codefendant whom defendant contended was not familiar with his handwriting.

8. Homicide— first-degree murder—short-form indictment— sufficiency

The short-form indictment for first-degree murder is sufficient to confer jurisdiction.

Appeal by defendant from order entered 19 July 2005 and judgment entered 26 August 2005 by Judge Henry E. Frye, Jr. in Superior Court, Guilford County. Heard in the Court of Appeals 28 August 2007.

Attorney General Roy Cooper, by Assistant Attorney General John G. Barnwell, for the State.

Mark Montgomery, for defendant-appellant.

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WYNN, Judge.

In reviewing a trial court's denial of a motion to suppress, we consider "whether the trial court's findings of fact are supported by the evidence and whether the findings of fact support the conclusions of law."¹ Here, Defendant argues that the trial court erred by denying his motion to suppress because the trial court's findings of fact are incomplete and irrational in light of the evidence presented. Because the trial court's findings of fact are supported by competent evidence, we affirm.

At trial, the State presented evidence that tended to show that on 12 October 2003, Defendant Henri Navothly Young ("Defendant") and his co-defendants Quenalin Baldwin and Titto Tyson Sabb broke into the home of Pablo Jesus Velasquez-Mayonquin with the intent to rob him. Defendant was armed with a gun and co-defendant Baldwin was armed with an air gun. When the trio arrived at Mr. Velasquez-Mayonquin's home, Defendant entered through the unlocked back door and motioned for his fellow co-defendants to come inside. Defendant went to a bedroom at the end of the hallway and instructed Mr. Velasquez-Mayonquin and his girlfriend, later identified as Sonja Carpio, to "give him the dinero."

Baldwin testified that he heard gun shots and a woman scream and saw Mr. Velasquez-Mayonquin fall to the floor. After the shooting, the trio ran out the back door. Mr. Velasquez-Mayonquin was transported to the hospital and died about a week after the shooting. The medical examiner testified that Mr. Velasquez-Mayonquin died as a result of six gunshot wounds, specifically the three gunshot wounds to his chest.

Approximately one month after the shooting, Defendant was in jail on charges unrelated to Mr. Velasquez-Mayonquin's shooting. Detectives James O'Connor, Kevin Ray, and Mark Kun suspected Defendant in Mr. Velasquez-Mayonquin's shooting and wanted to get access to his pistols. On 14 November 2003, Detectives O'Connor, Kun, and Ray met with Defendant at High Point Jail and questioned Defendant about the accidental shooting of his girlfriend. Detective O'Connor indicated that Detective Kun was a federal officer working to remove guns from the streets. The detectives agreed not to charge Defendant with the shooting of his girlfriend or for possession of a firearm by a felon, if Defendant would turn over his two guns. Dur-

1. *State v. Cockerham*, 155 N.C. App. 729, 736, 574 S.E.2d 694, 699 (citation omitted), *disc. review denied*, 357 N.C. 166, 580 S.E.2d 702 (2003).

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ing the 14 November 2003 conversation, Detectives did not question Defendant about or mention the homicide of Mr. Velasquez-Mayonquin. Defendant agreed to turn in his firearms and arranged for his brother to bring his two pistols to the police station. Ballistic testing was completed on the guns, and the testing showed that one of Defendant's pistols, State's Exhibit 19, fired the fatal shots in the homicide of Mr. Velasquez-Mayonquin.

On 1 December 2003, Defendant was charged with the murder of Mr. Velasquez-Mayonquin. Detective O'Connor presented Defendant with a written *Miranda* waiver form and at that time, Defendant questioned the detectives about the various levels of homicide and the possible penalties. The detectives called Randy Carroll, an Assistant District Attorney in Guilford County, to answer Defendant's questions. According to the detectives, Defendant appeared to be weighing his options, and thereafter, waived his *Miranda* rights. At trial, a taped, redacted account of Defendant's statement to police that he had shot Mr. Velasquez-Mayonquin was admitted into evidence and played for the jury.

Following a jury trial, Defendant was found guilty of first-degree murder, first-degree burglary, and attempted robbery with a dangerous weapon and was sentenced to life imprisonment without parole. Defendant appeals contending that: (I) the trial court erred by denying his motion to suppress his statement to police; (II) he received ineffective assistance of counsel because trial counsel did not raise a meritorious constitutional claim; (III) the trial court committed plain error by failing to arrest judgment on both of the underlying felonies; (IV) the trial court erred by admitting into evidence letters attributed to Defendant; and (V) the murder indictment was inadequate to confer jurisdiction on the trial court.

I.

[1] Defendant first contends that the trial court erred by denying his motion to suppress his statements to police. Specifically, Defendant asserts that he was interrogated on 1 December 2003, "prior to invoking his *Miranda* rights" and that the trial court's findings of fact were incomplete because the trial court failed to resolve the issue of whether he waived his *Miranda* rights prior to being interrogated by the police. We disagree.

As a preliminary matter, we note that Defendant's first argument refers to the trial court's denial of his motion to suppress his statement made to police on 1 December 2003. However, Defendant

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spends a great deal of time discussing the alleged erroneous admission of Defendant's guns recovered by police on 14 November 2003. Defendant's motion to suppress did not include a request to suppress the guns. Therefore, Defendant cannot now challenge the admission of the guns, and his discussion of such is in violation of the North Carolina Rules of Appellate Procedure. *See* N.C. R. App. P. 10(a) (providing that "the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal . . ."). Accordingly, Defendant's argument regarding the suppression of the guns will not be considered.

[2] The standard of review to determine whether a trial court properly denied a motion to suppress is "whether the trial court's findings of fact are supported by the evidence and whether the findings of fact support the conclusions of law." *State v. Cockerham*, 155 N.C. App. 729, 736, 574 S.E.2d 694, 699 (citing *State v. Wynne*, 329 N.C. 507, 522, 406 S.E.2d 812, 820 (1991)), *disc. review denied*, 357 N.C. 166, 580 S.E.2d 702 (2003). The trial court's findings of fact "are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (citations omitted).

In this case, the parties do not dispute whether Defendant was in custody or whether his statements were voluntary, issues of law that are reviewed *de novo*. *See State v. Crudup*, 157 N.C. App. 657, 659, 580 S.E.2d 21, 23 (2003) (noting that whether a person is in custody is a fully reviewable question of law); *State v. Orteza*, 178 N.C. App. 236, 244, 631 S.E.2d 188, 195 (2006) (stating that conclusions concerning the voluntariness of a defendant's statement are reviewable *de novo*). The parties do dispute the point at which Defendant waived his *Miranda* rights. Since this is not a question of law, but a question of fact, our review is limited to whether the findings of fact are supported by competent evidence. *Buchanan*, 353 N.C. at 336, 543 S.E.2d at 826.

It is well established that "*Miranda* warnings are required only when a defendant is subjected to custodial interrogation." *State v. Johnston*, 154 N.C. App. 500, 502, 572 S.E.2d 438, 440 (2002) (citing *State v. Patterson*, 146 N.C. App. 113, 121, 552 S.E.2d 246, 253 (2001)). The *Miranda* decision defines custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 706 (1966). Interrogation is further defined as "[a] practice that

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the police should know is reasonably likely to evoke an incriminating response from a suspect.” *Rhode Island v. Innis*, 446 U.S. 291, 301, 64 L. Ed. 2d 297, 308 (1980).

[3] Defendant provides three arguments to support his contention that the trial court erred by denying his motion to suppress his statements made to police on 1 December 2003. First, Defendant argues that the trial court’s findings of fact are incomplete because the court did not make a finding about whether Defendant was questioned before the police gave him *Miranda* warnings. We disagree. The trial court made the following findings of fact concerning Defendant’s renewed motion to suppress his statements to police after a *voir dire* hearing of Detectives O’Connor and Ray:

19. Detective James O’Connor advised the defendant of his *Miranda* rights, and went over each of these rights with the defendant.

20. Detective O’Connor indicated that defendant understood each of those rights.

21. An unsigned form which contained those *Miranda* rights was given to the defendant to review for himself.

22. Defendant at the time did not sign the waiver or invoke his right to counsel or his right to remain silent. Defendant indicated that prior to waiving his rights, he wanted questions answered.

....

26. Defendant was approximately five to six feet away from Detective O’Connor when he contacted Assistant District Attorney Carroll on his cell phone. Prior to and during this call, the defendant did not invoke his right to remain silent.

....

31. After receiving this information, the defendant responded that he could receive life or death. Defendant then said “do I live or die.” He then began to say the words life death repeatedly as he gestured with his hands as if weighing scales.

32. He subsequently looked directly at the Detective, and said “I want to die, let’s talk.”

33. At 5:05 p.m., the defendant then executed the rights waiver form State’s Exhibit 55 by signing and dating it which included

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waiving his right to remain silent and his right to counsel being present.

34. After signing the rights waiver form the Detectives talked to the defendant about the evidence against him including the alleged murder weapon a firearm, and other information concerning the case.

The trial court's findings of fact demonstrate the sequence in which Defendant was questioned by police, and as evidenced specifically by finding of fact number thirty-four, the trial court found that the police did not question Defendant about Mr. Velasquez-Mayonquin's homicide until after he waived his *Miranda* rights. Accordingly, we find that the trial court's findings of fact are not incomplete.

[4] Defendant next argues that to the extent the trial court found that the police did not interrogate him prior to his waiver of his *Miranda* rights, the evidence does not support such a finding. We disagree.² Defendant assigns error to findings of fact numbers nineteen, twenty, twenty-one, twenty-two, twenty-six, thirty-one, thirty-two, thirty-three, and thirty-four. In support of Defendant's contention that the detectives interviewed him before reading him his *Miranda* rights, Defendant relies on a portion of Detective Ray's supplemental report, which states: "O'Connor and I interviewed him at the time of his arrest at the police department. We confronted him with evidence including the fact that we had the murder weapon. Young was advised of his rights, and he waived them."

However, the findings of fact contested by Defendant are supported by the testimony of Detectives O'Connor and Ray.³ During direct examination in the *voir dire* hearing, Detective O'Connor stated that he:

Got [Defendant] something to drink. We sat down. Detective Ray was the lead investigator. He . . . advised [Defendant] what he was

2. Because we find no error in the trial court's findings of fact, we do not reach Defendant's third contention that if the police questioned Defendant prior to giving *Miranda* warnings, it is immaterial that they also questioned him after giving *Miranda* warnings.

3. We note that the trial court's findings of fact state that "Detective James O'Connor advised the defendant of his *Miranda* rights," but both detectives testified that Detective Ray advised Defendant of his *Miranda* rights. Defendant did not dispute which detective advised him of his *Miranda* rights, and a mistake in the detective's name ultimately does not change our analysis.

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charged with, he was being charged with this murder. And there wasn't much reaction from him. He just kind of sat there [W]e told him, uh, there was conversation prior to it, just that we'd like to talk with him about this. That . . . a murder, this case is like a big puzzle, and that he's holding some of the pieces of the puzzle, and that we wanted a complete and clear picture of this, and would he talk with us. And . . . he sat there and said, you know, kind of nodded his head . . . he was kind of unclear. Detective Ray advised him of his Miranda rights.

Additionally, Detective Ray testified that he:

read [Defendant] the Miranda rights, asking him if he understood each one. And after those rights were read, he had this question. Then a phone call was made. His questions were answered. And after he decided that he wanted to continue and to speak with us, after he had decided that he didn't want an attorney and he decided that he didn't want to be silent, he signed the waiver. And at that time, I recorded the time on the form.

Furthermore, in response to counsels' questions, both Detectives repeatedly testified that Defendant was not questioned prior to receiving his *Miranda* warnings. The statements of Detectives O'Connor and Ray constitute competent evidence supporting the trial court's findings of fact, even if conflicting evidence was also presented. *See Buchanan*, 353 N.C. at 336, 543 S.E.2d at 826.

Defendant also assigns error to findings of fact numbers thirteen and fourteen and conclusions of law numbers one through six. However, Defendant does not set forth any argument to support his assignments of error; thus, the assignments of error are deemed abandoned. N.C. R. App. P. 28(a) (providing that "[q]uestions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief are deemed abandoned.").

We must keep in mind that "[w]here the trial judge sits as a jury and where different *reasonable* inferences can be drawn from the evidence, the determination of which reasonable inferences shall be drawn is for the trial judge." *Sharp v. Sharp*, 116 N.C. App. 513, 530, 449 S.E.2d 39, 48 (1994) (internal quotations and citations omitted) (emphasis in original). Indeed, "[t]he trial judge has the authority to believe all, any, or none of the testimony." *Id.* Here, the trial court chose to believe the detectives' rendition of the facts, rather than Defendant's assertion that the supplemental report reflected the

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order in which he was questioned. Accordingly, we hold that there is competent evidence to support the findings of fact, and in turn, the findings of fact support the conclusions of law. Therefore, we affirm the trial court's denial of the motion to suppress.

II.

[5] Defendant next argues that he was denied effective assistance of counsel because his trial counsel failed to raise a meritorious constitutional claim at trial. We disagree.

We follow a two-part test for determining the merits of an ineffective assistance of counsel claim:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)). Our Supreme Court has stated "[c]ounsel is given wide latitude in matters of strategy, and the burden to show that counsel's performance fell short of the required standard is a heavy one for defendant to bear." *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001), *cert. denied*, 537 U.S. 846, 154 L. Ed. 2d 73 (2002). We presume trial counsel's advocacy to be "within the boundaries of acceptable professional conduct." *State v. Roache*, 358 N.C. 243, 280, 595 S.E.2d 381, 406 (2004).

In this case, Defendant argues that his counsel was ineffective because he failed to make a motion to suppress the results of the gun tests, which were obtained by the police through trickery. Defendant cites *Bumper v. North Carolina* for the proposition that consent given as a result of fraud or dishonesty by the police is not consent. 391 U.S. 543, 550, 20 L. Ed. 2d 797, 804 (1968) ("When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent.").

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However, for the principles from *Bumper* to apply, there must be a search. “Before the legality of an alleged search may be questioned, it is necessary to first determine whether there has actually been a search. A search ordinarily implies, a quest by an officer of the law, a prying into hidden places for that which is concealed.” *State v. Raynor*, 27 N.C. App. 538, 540, 219 S.E.2d 657, 659 (1975) (internal quotation omitted). Our Supreme Court has found that there is no search within the constitutional prohibition against unreasonable searches and seizures when “the evidence is delivered to a police officer upon request and without compulsion or coercion.” *State v. Reams*, 277 N.C. 391, 396, 178 S.E.2d 65, 68 (1970), *cert. denied*, 404 U.S. 840, 30 L. Ed. 2d 74 (1971), *overruled on other grounds*, 336 N.C. 268, 443 S.E.2d 68 (1994).

Defendant’s argument hinges on whether the detectives’ actions amounted to “compulsion or coercion,” because despite the trickery, Defendant voluntarily delivered the guns to the police, negating a search and a violation of the Fourth Amendment. *See Raynor*, 27 N.C. App. at 541, 219 S.E.2d at 659. Defendant contends that the threat of prosecution for possession of a firearm by a felon and for the accidental shooting of his girlfriend led Defendant to turn over the guns out of coercion.

Defendant cites *State v. Booker* for the proposition that statements that result from the threat or promise of prosecution are coercive, so the statements and the evidence discovered as a result must be suppressed. 306 N.C. 302, 293 S.E.2d 78 (1982). However, Defendant interprets *Booker* too broadly. In *Booker*, our Supreme Court made clear that “the inducement to confess whether it be a promise, a threat, or mere advice must relate to the prisoner’s *escape* from the criminal charge against him.” *Id.* at 308, 293 S.E.2d at 82 (emphasis in original). Moreover, “[i]mproper inducement engendering hope must promise relief from the criminal charge to which the confession relates, not to any merely collateral advantage.” *Id.*

Here, the detectives promised Defendant relief from his criminal charges relating to the accidental shooting and possession of a firearm by a felon. Assuming *arguendo* that engendering hope was improper, both of the charges mentioned by the detectives were not related to the murder of Mr. Velasquez-Mayonquin, therefore, the coercive argument fails. In fact, the detectives were careful not to mention the murder of Mr. Velasquez-Mayonquin in their 14 November 2003 conversation with Defendant. Furthermore, the

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detectives upheld their agreement not to pursue criminal charges against Defendant for the accidental shooting and possession of a firearm by a felon.

Even if defense counsel had made the motion to suppress the guns at trial, based on the evidence in the record, the trial court would have denied Defendant's motion. We do not consider counsel's actions at trial as falling below the "objective standard of reasonableness." Accordingly, we find no error.

III.

[6] Next, Defendant contends that the trial court committed plain error by failing to arrest both underlying felonies. The State agrees with Defendant, but only to the extent that one of the felonies should be arrested. After the jury convicted Defendant of first-degree murder, first-degree burglary, and attempted robbery with a dangerous weapon, the trial court entered judgment against Defendant on first-degree murder and both underlying felonies. Our law is clear that "if the State secures an indictment for the underlying felony and a defendant is convicted of both the underlying felony and felony murder, the defendant will only be sentenced for the murder." *State v. Dudley*, 151 N.C. App. 711, 716, 566 S.E.2d 843, 847 (2002), disc. review denied, 356 N.C. 684, 578 S.E.2d 314 (2003). Thus, "the underlying felony must be arrested under the merger rule." *Id.* Accordingly, we remand this case for the trial court to arrest judgment on one of the underlying felonies.

IV.

[7] Defendant next argues that the trial court erred by admitting into evidence letters attributed to Defendant. We disagree.

Under our Rule of Evidence Rule 901(b)(2), authentication or identification of handwriting may be established through "nonexpert opinion as to the genuineness of the handwriting, based upon familiarity not acquired for purposes of the litigation." N.C. Gen. Stat. § 8C-1, Rule 901(b)(2) (2005). However, Rule 901 also provides that authentication or identification may be established through distinctive characteristics and the like, i.e., through "appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." N.C. Gen. Stat. § 8C-1, Rule 901(b)(4).

Here, Defendant's co-defendant Baldwin testified that he received three letters from Defendant. Defendant asserts that Baldwin was not

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familiar with Defendant's handwriting and was not sure if Defendant could write; therefore, the State failed to authenticate the letters. However, familiarity with one's handwriting is not the only method to authenticate a letter.

In this case, Baldwin testified that Defendant told him on several occasions that he would write to him.⁴ Baldwin also explained that one of letters was addressed "From Navothly to Q," which was how Baldwin and Defendant referred to each other. Two of the letters also had the return address "Henri Young, 507 East Green Drive." In addition to these distinctions, the content of the letters indicated that Defendant wrote the letters because they contained intimate knowledge of the crime. Although such evidence may be circumstantial, we have held:

A writing may be authenticated by the production of sufficient evidence from which the jury could find that the writing was either written or authorized by the person who the writing indicates was responsible for its contents. Once evidence from which the jury could find that the writing is genuine has been introduced, the writing becomes admissible. Upon the admission of the writing into evidence, it is solely for the jury to determine the credibility of the evidence both with regard to the authenticity of the writing and the credibility of the writing itself.

Milner Hotels, Inc. v. Mecklenburg Hotel, Inc., 42 N.C. App. 179, 180-81, 256 S.E.2d 310, 311 (1979); *see also State v. Davis*, 203 N.C. 13, 28, 164 S.E. 737, 745 ("That the authorship and genuineness of letters, typewritten or other, may be proved by circumstantial evidence, is fully established by the decisions."), *cert. denied*, 287 U.S. 649, 77 L. Ed. 561 (1932).

Accordingly, based on the evidence presented by the State, the trial court did not err in admitting State's exhibits 70, 71, and 72 into evidence.

V.

[8] In his final argument, Defendant contends that the short-form murder indictment was inadequate to confer jurisdiction on the trial court. This argument is without merit.

"Our Supreme Court 'has consistently held that indictments for murder based on the short-form indictment statute are in compliance

4. Defendant spoke with Baldwin when they were in a holding cell together and when they were both in another county in the same cell block.

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with both the North Carolina and United States Constitutions[,]’ and ‘the short-form indictment is sufficient to charge first-degree murder on the basis of any of the theories, including premeditation and deliberation’” *State v. Stroud*, 147 N.C. App. 549, 556-57, 557 S.E.2d 544, 549, *cert. denied*, 356 N.C. 623, 575 S.E.2d 758 (2002). Accordingly, we find no error.

Affirmed in part, remanded in part for resentencing.

Judges HUNTER and BRYANT concur.

STATE OF NORTH CAROLINA v. KAHER MARUF MUHAMMAD

No. COA06-1430

(Filed 16 October 2007)

1. Appeal and Error— presentation of issues—no argument below—grounds for motion to dismiss

Defendant did not preserve for appellate review specific grounds not argued to the trial court on a motion to dismiss a first-degree murder charge.

2. Criminal Law— pretrial detention hearing—terrorist watch list

The prosecutor did not violate defendant’s right to a fair trial in a first-degree murder prosecution when he explained during a pre-trial detention hearing that defendant was not the person with a similar name on the National Terrorist Watch List. N.C.G.S. § 15A-954(a)(4).

3. Constitutional Law— right to remain silent—pre-trial exercise—admissible

There was no plain error in a first-degree murder prosecution in the admission of defendant’s pre-trial exercise of his right to remain silent. The evidence served to explain the context of statements made by defendant after he was advised of his rights, the State did not make any prejudicial comment implying or inviting assumptions from defendant’s silence, and defendant did not show that a fundamental error was committed or that the error (assuming there was one) changed the outcome.

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4. Evidence— murder victim's faith—photograph of victim—personal effects—admission not plain error

There was no plain error in a first-degree murder prosecution in the admission of evidence of the victim's faith, a photograph of her when alive, and her bloody eyeglasses and other personal effects.

5. Criminal Law— instructions on accident denied—no error

Any error in denying a first-degree murder defendant's request for a jury instruction on the defense of accident was harmless. The jury received instructions on possible lesser included offenses and found that all of the elements of first-degree murder were met.

6. Criminal Law— instruction on voluntary intoxication denied—deliberation and premeditation

The trial court did not err in a first-degree murder prosecution by denying the defendant's request for an instruction on the defense of diminished capacity by voluntary intoxication. There was no evidence suggesting that defendant was incapable of forming a deliberate and premeditated purpose to kill.

7. Homicide— first-degree murder—short-form indictment

A short-form indictment was sufficient to allege first-degree murder.

8. Evidence— prior conviction—more than ten years old—admission not plain error

There was no plain error (defendant made a motion in limine but failed to object at trial) in a first-degree murder prosecution in the admission of evidence of a prior conviction that was more than ten years old.

Appeal by defendant from judgment entered 31 March 2006 by Judge John R. Jolly, Jr. in Martin County Superior Court. Heard in the Court of Appeals 20 August 2007.

Roy Cooper, Attorney General, by Diane A. Reeves, Special Deputy Attorney General, for the State.

Staples Hughes, Appellate Defender, by Daniel R. Pollitt, Assistant Appellate Defender, for defendant-appellant.

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MARTIN, Chief Judge.

Defendant appeals from a judgment entered upon a jury verdict finding him guilty of the first degree murder of Shelby Tripp Leggett. At trial, the evidence tended to show that defendant was a close friend of Amy Jo Nicholson and spent a great deal of time at her home. Amy Nicholson's teenage daughter, Rebecca Nicholson, and Rebecca's daughter also lived in Amy Nicholson's house. Defendant was very protective of Rebecca. Rebecca's boyfriend, and the father of her child, was Troy Edwards. Edwards had a criminal history and admittedly used crack cocaine.

On the night of 8 February 2005, Edwards' grandmother, Shelby Leggett, was driving Rebecca and Edwards to Amy Nicholson's house to leave the baby with Amy and pick up some clothes for Rebecca. When they arrived, defendant was outside drinking. He tried to get Rebecca to speak to him, but she would not. Rebecca got in the back of the car with Edwards, with Leggett driving. Defendant followed them in his car as they left.

Defendant made a series of twenty telephone calls to Rebecca's cell phone, which she was carrying. According to defendant's own testimony, he was enraged at the time and wanted to get Rebecca away from Edwards. In one call, defendant said "you need to F-ing call me back right now. Don't make me kill nobody, all right. Don't f[—]ing make me kill nobody. In a minute I'm going to go inside and shoot somebody. Call me." In another message, defendant said "I'm going to F-ing kill everybody in a minute. You need to answer the G D phone or call me back or do something. I'm going to get that bitch out in the ditch in a minute." While defendant was following the others in his car, he repeatedly came very close to Leggett's car. When they reached the intersection with Highway 125, defendant ran the stop sign, passed them, changed direction in the road, and made his tires screech, so that Leggett almost hit him. Then Leggett pulled to the side of the road, and defendant pulled up beside her car. He got out of his car holding a pistol. As he approached Leggett's window, he said "I don't have a problem with you yet." The pistol discharged within a foot or two of Leggett's face, and she was killed by the bullet. Defendant then drove back to Amy Nicholson's residence.

According to defendant's own testimony, he got out of his car with his gun in hand and walked toward Leggett's car. He wanted Rebecca to get out of the car and wanted Edwards to see the gun, which defendant thought was empty. Defendant testified that as he

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walked toward the driver's side window, he stumbled, caught himself by placing his hand on the car roof, and the gun fired.

The jury found defendant guilty of first degree murder on the basis of premeditation with deliberation and felony murder. Defendant appeals his conviction.

[1] Defendant raises seven issues on appeal. He first contends the trial court erroneously denied his motion to dismiss under N.C.G.S. § 15A-954(a)(4), which requires dismissal of a claim when “[t]he defendant’s constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant’s preparation of his case that there is no remedy but to dismiss the prosecution.” N.C. Gen. Stat. § 15A-954(a)(4) (2005). In his brief, defendant argues four allegedly flagrant violations causing irreparable prejudice: (1) that the prosecutor made statements about defendant’s possible presence on the National Terrorist Watch List; (2) that the Clerk of Court refused to approve defendant’s documentation of citizenship; (3) that the trial court revoked defendant’s bail *ex parte*; and (4) that the trial court refused to determine the conditions of pre-trial release. Of these assertions, only the statements about the National Terrorist Watch List were raised in defendant’s motion. “[W]here a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts.” *State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002) (internal quotation marks omitted). Since these specific grounds were not argued in defendant’s motion to the trial court, they are not preserved for appellate review. *See* N.C. R. App. P. 10(b)(1) (2006).

[2] As for defendant’s argument that the prosecutor improperly made statements about defendant’s possible presence on the National Terrorist Watch List, in violation of N.C.G.S. § 15A-954(a)(4), defendant fails to cite any dispositive authority in support of his contention. Defendant alleges that the prosecutor violated defendant’s right to a fair trial, as embodied in *State v. Jones*, 355 N.C. 117, 132, 558 S.E.2d 97, 107 (2002), when the prosecutor explained to the trial judge during a pre-trial detention hearing that a name similar to the defendant’s with defendant’s date of birth appeared on the National Terrorist Watch List and the prosecutor’s office followed up on the hit and determined it was not the defendant. However, *Jones* concerns the issue of prejudicial statements made to a jury during closing arguments, *id.*; hence, it is not determinative of the issue raised by de-

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defendant in this case. Defendant does not cite any other authority demonstrating a violation of defendant's constitutional rights; therefore, this assignment of error is overruled.

[3] Defendant next contends that the trial court erroneously admitted evidence of his pre-trial exercise of his right to remain silent in violation of the Fifth Amendment to the U.S. Constitution. Defendant notes "a defendant's exercise of his constitutionally protected right[] to remain silent . . . during interrogation may not be used against him at trial." *State v. Elmore*, 337 N.C. 789, 792, 448 S.E.2d 501, 502 (1994). Thus, defendant argues that the court's admission into evidence of a signed waiver of rights form indicating that defendant did not want to speak with police officers, as well as testimony about the circumstances of his exercising his *Miranda* rights, is constitutional error entitling him to a new trial. "[S]uch a constitutional error will not warrant a new trial where it was harmless beyond a reasonable doubt." *Elmore*, 337 N.C. at 792, 448 S.E.2d at 502. In the instant case, however, defendant did not object to the testimony or the introduction of the *Miranda* form; therefore, defendant must show plain error. "[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a '*fundamental*' error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,'" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (alteration in original) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)). Assuming *arguendo* that the court erred in admitting the evidence that defendant exercised his right to remain silent, defendant has not shown that a fundamental error was committed or that the result of his trial would probably have been different had the error not occurred. The admitted evidence served to explain the context of statements that were made by defendant after he was advised of his rights. The State did not make any prejudicial comment implying or inviting assumptions from defendant's silence. Therefore, this assignment of error is overruled.

[4] By his next argument, defendant contends the trial court erred in admitting irrelevant and inadmissible evidence about the victim's good character. Among the evidence that defendant identifies as inadmissible are: (1) testimony evidencing the victim's Christian faith; (2) a photograph of the victim when she was alive; and (3) the victim's bloody eyeglasses and other personal effects. Because defendant did not object to this evidence at trial, defendant must show plain error.

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N.C.G.S. § 8C-1, Rule 401, defines evidence as “relevant” when it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” N.C. Gen. Stat. § 8C-1, Rule 401 (2005). Generally, relevant evidence is admissible. N.C. Gen. Stat. § 8C-1, Rule 402 (2005). However, relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” N.C. Gen. Stat. § 8C-1, Rule 403 (2005). “[E]ven though a trial court’s rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal.” *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991).

Defendant argues that “[e]vidence of the general good character of the deceased is incompetent and the admission of it constitutes prejudicial error.” *State v. King*, 26 N.C. App. 86, 87, 214 S.E.2d 597, 597 (1975). Defendant fails to recognize that if evidence is introduced not to show the good character of the victim, but rather for another permissible purpose, then the evidence may be relevant and properly admitted. *State v. Alford*, 339 N.C. 562, 569, 453 S.E.2d 512, 515 (1995). In the present case, evidence that the victim’s last words were “I’m not scared of you. I’m a Christian,” were not offered as evidence of the victim’s good character, but rather were offered as circumstantial evidence of defendant’s state of mind when he was approaching the victim. Other evidence of the victim’s good character was echoed by defendant himself and integrated into his defense. While Edwards testified that Leggett “would do anything that you want[ed]. I mean she’d do anything in the world,” defendant himself testified “I can’t imagine anybody would want to hurt her. She’s so sweet.”

As for the other evidence that defendant challenges on appeal, the photograph, the eyeglasses, and key chain, defendant bears the burden of showing that the admission of this physical evidence was plain error. The evidence against defendant was substantial and any prejudice arising from the admission of this physical evidence was *de minimis*. Therefore, defendant’s assignment of plain error to the admission of this evidence is overruled.

[5] Defendant’s fourth argument is that the trial court erroneously denied his request for a jury instruction on the defense of accident. Defendant argues the instruction was timely requested, correct in

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law, supported by the evidence, and not given in substance. “Where the killing was unintentional and the perpetrator acted without wrongful purpose in the course of a lawful enterprise and without criminal negligence, a homicide will be excused as an accident.” *State v. Garrett*, 93 N.C. App. 79, 82, 376 S.E.2d 465, 467 (1989). “[I]f request be made for a specific instruction, which is correct in itself and supported by evidence, the court must give the instruction at least in substance.” *State v. Hooker*, 243 N.C. 429, 431, 90 S.E.2d 690, 691 (1956).

Assuming *arguendo* that the trial court erred in failing to instruct the jury on accident, a trial court’s failure to submit a requested instruction to the jury is harmless unless defendant can show he was prejudiced thereby. *State v. Riddick*, 340 N.C. 338, 343, 457 S.E.2d 728, 732 (1995). “A defendant is prejudiced . . . when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial” N.C. Gen. Stat. § 15A-1443(a) (2005).

“The defense of accident ‘. . . is not an affirmative defense, but acts to negate the *mens rea* element of homicide.’” *State v. Turner*, 330 N.C. 249, 262, 410 S.E.2d 847, 854 (1991) (quoting *State v. Lytton*, 319 N.C. 422, 425-26, 355 S.E.2d 485, 487 (1987)). In the case before us, the jury received instructions on possible lesser included offenses of second degree murder, voluntary manslaughter, and involuntary manslaughter in addition to first degree murder. The jury found that all of the elements of first degree murder were met, including the *mens rea* element. Because the jury was satisfied that defendant had the requisite intent for first degree murder and rejected other possible verdicts, including involuntary manslaughter which requires no intent, defendant was not prejudiced by the trial court’s failure to instruct on accident.

[6] Defendant’s next argument is that the trial court erroneously denied his request for a jury instruction on the defense of diminished capacity by voluntary intoxication. Defendant argues that there was substantial evidence of his intoxication, including testimony that defendant was drinking tequila straight from a one-gallon bottle and also drank three or four beers over a period of about an hour and a half. Defendant contends this evidence was sufficient to warrant an instruction on voluntary intoxication; however:

[I]t is . . . well established that an instruction on voluntary intoxication is not required in every case in which a defendant claims that he killed a person after consuming intoxicating beverages or

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controlled substances. In order to support a defense of voluntary intoxication, substantial evidence must be presented to show that at the time of the killing the defendant was so intoxicated that he was utterly incapable of forming a deliberate and premeditated purpose to kill. In the absence of evidence of intoxication to this degree, the court is not required to charge the jury on the defense of voluntary intoxication.

State v. Baldwin, 330 N.C. 446, 462, 412 S.E.2d 31, 41 (1992) (internal citations and quotation marks omitted). Thus, the relevant inquiry is whether evidence was presented that defendant was so drunk that he could not form the intent to kill. Addressing this question in other cases, this Court and our Supreme Court have considered other aspects of defendants' behavior in order to determine whether a voluntary intoxication instruction is warranted, such as a defendant's ability to drive and communicate with other people. See *State v. Cheek*, 351 N.C. 48, 75-76, 520 S.E.2d 545, 561 (1999); *State v. Watkins*, 89 N.C. App. 599, 606, 366 S.E.2d 876, 880 (1988). Defendant in this case was able to do both. Although defendant's actions indicated that he was intoxicated, "[e]vidence of mere intoxication . . . is not sufficient to meet defendant's burden of production." *State v. Boyd*, 343 N.C. 699, 713, 473 S.E.2d 327, 334 (1996). There was no evidence suggesting that defendant was incapable of forming a deliberate and premeditated purpose to kill.

[7] Defendant next argues that the "short-form" indictment did not charge first degree murder and therefore the trial court lacked jurisdiction to enter judgment for first degree murder. The North Carolina Supreme Court "has held for many years that the 'short-form' murder indictment under N.C.G.S. § 15-144 is sufficient to allege first-degree murder under theories of both premeditation and deliberation and felony murder." *State v. Davis*, 353 N.C. 1, 44, 539 S.E.2d 243, 271 (2000), *cert. denied*, 534 U.S. 839, 122 S. Ct. 95, 151 L. Ed. 2d 55 (2001). Accordingly, this assignment of error is overruled.

[8] Defendant's final argument is that the trial court erred in admitting evidence of defendant's prior conviction that occurred more than ten years ago. Defendant argues that the trial court failed to make sufficient findings about the probative value of the conviction and that the conviction was inadmissible because it did not involve dishonesty and was for a different crime than the one charged in the present case. The fact that the conviction was for a crime that did not involve dishonesty and was a different crime from the one charged in this case alone is not dispositive of its admissibility. When more than ten

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years have passed after a conviction, evidence of the conviction is inadmissible “unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.” N.C. Gen. Stat. § 8C-1, Rule 609(b) (2005). “We interpret this part of Rule 609(b) to mean that the trial court must make findings as to the specific facts and circumstances which demonstrate the probative value outweighs the prejudicial effect.” *State v. Hensley*, 77 N.C. App. 192, 195, 334 S.E.2d 783, 785 (1985). “[T]he following considerations [are] factors to be addressed by the trial court when determining if conviction evidence more than ten years old should be admitted: (a) the impeachment value of the prior crime, (b) the remoteness of the prior crime, and (c) the centrality of the defendant’s credibility.” *State v. Shelly*, 176 N.C. App. 575, 582-83, 627 S.E.2d 287, 294 (2006) (citing *State v. Holston*, 134 N.C. App. 599, 606, 518 S.E.2d 216, 222 (1999)). This Court has also noted that:

[A]ppropriate findings should address (a) whether the old convictions involved crimes of dishonesty, (b) whether the old convictions demonstrated a “continuous pattern of behavior,” and (c) whether the crimes that were the subject of the old convictions were “of a different type from that for which defendant was being tried.”

Id. at 583, 627 S.E.2d at 295 (quoting *Hensley*, 77 N.C. App. at 195, 334 S.E.2d at 785).

In the present case, the court considered the following facts and circumstances of defendant’s prior conviction: that the conviction was a felony conviction from 1993 in New Jersey; that defendant’s status as a convicted felon made it illegal for him to possess the firearm in the present case; that the prior conviction, like the case in question, involved eluding the police; and that the prior conviction was for aggravated assault, manifesting extreme indifference to the value of human life, and recklessly causing serious bodily injury. The court incorporated by reference these facts and circumstances into its findings when it stated “under the facts and circumstances as best we can tell on the face of that record and in the context of this case [the probative value of the conviction] substantially outweigh[s] the prejudicial effect.” With regard to the weight assigned to the facts and circumstances, “[t]he trial court’s ultimate determination is reversible only for a manifest abuse of discretion.” *Shelly*, 176 N.C. App. at 578, 627 S.E.2d at 292. Accordingly, we conclude that the trial court did not err in admitting evidence of defendant’s prior conviction.

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Furthermore, although defendant objected to the admission of the testimony through his motion *in limine*, he failed to object again to the evidence when it was introduced. “Our Supreme Court has consistently held that ‘[a] motion *in limine* is insufficient to preserve for appeal the question of the admissibility of evidence if the defendant fails to further object to that evidence at the time it is offered at trial.’ ” *State v. Tutt*, 171 N.C. App. 518, 520, 615 S.E.2d 688, 690 (2005) (quoting *State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999)). Under such circumstances, the error is reviewed only for plain error. *Id.* at 714, 603 S.E.2d at 834. Even if it had been error to admit evidence of defendant’s prior conviction, it does not rise to the level of plain error in light of the other evidence of defendant’s intent, the limited evidence presented of the conviction, and the court’s instruction that the prior conviction evidence could be considered only for the limited purpose of determining credibility.

No error.

Judges McCULLOUGH and TYSON concur.

STATE OF NORTH CAROLINA v. HAROLD RAY ESTES

No. COA07-225

(Filed 16 October 2007)

**1. False Pretense— obtaining property by false pretenses—
conspiracy to obtain property by false pretenses—motion
to dismiss—sufficiency of evidence—aiding and abetting**

The trial court did not commit prejudicial error by denying defendant’s motions to dismiss the charges of obtaining property by false pretenses and conspiracy to obtain property by false pretenses at the close of the evidence where the jury could infer through defendant’s actions and relationships to the parties that he knowingly and willingly laundered nearly one-half million dollars through his personal and business banking accounts in aiding and abetting multiple persons in obtaining property by false pretenses from the school system.

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2. Indictment and Information—constructive amendment through jury instructions—change from acting in concert to aiding and abetting—obtaining property by false pretenses

The trial court did not constructively amend the allegation in the indictment from acting in concert to aiding and abetting obtaining property by false pretenses through the jury instructions, because: (1) the bill of indictment charged defendant with the offense of obtaining property by false pretenses under N.C.G.S. § 14-100; (2) the charge was not substantially altered when neither acting in concert nor aiding and abetting are essential elements to the crime of obtaining property by false pretenses, and either theory of criminal liability is treated as surplusage; (3) defendant failed to show that instructing the jury on the basis of one of these theories of guilt substantially altered the charged offense, and our Supreme Court has stated the distinction between a defendant being found guilty of aiding and abetting and acting in concert is of little significance; (4) defendant had timely notice of the charges brought against him to enable him to adequately prepare his defense for trial; and (5) defendant was not convicted of a crime different from that alleged in the bill of indictment.

3. Criminal Law—clerical error in judgment—embezzlement—obtaining property by false pretenses

The trial court erred by entering judgment against defendant for embezzlement when he was charged with and found to be guilty by a jury of obtaining property by false pretenses, and the case is remanded to the trial court for the limited purpose of corrected this clerical error in the judgment and commitment.

Appeal by defendant from judgments entered 25 August 2006 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 13 September 2007.

Attorney General Roy Cooper, by Assistant Attorney General David N. Kirkman, for the State.

The Martin Law Firm, P.A., by J. Matthew Martin and Harry C. Martin, for defendant-appellant.

TYSON, Judge.

Harold Ray Estes (“defendant”) appeals from judgments entered after a jury found him to be guilty of obtaining property by false pre-

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tenses pursuant to N.C. Gen. Stat. § 14-100 and conspiracy to obtain property by false pretenses pursuant to N.C. Gen. Stat. § 14-2.4 and § 14-100. We find no error at trial and remand for correction of a clerical error in 05 CRS 082472.

I. Background

Defendant was involved in a scheme involving “prebill” phoney invoices to defraud the Wake County Board of Education and the Wake County Public School System (the “School System”) out of millions of dollars, perpetrated by employees of Barnes Motor & Parts Co. (“Barnes”) and employees of the School System’s Department of Transportation (the “School Bus Garage”).

Several employees of the School Bus Garage became suspicious of their co-workers’ activities. Doug Kenney (“Kenney”), Director of Internal Audit for Wake County, initiated an investigation into the business relationship between Barnes and the School Bus Garage.

Kenney conducted a physical review of invoices from and checks to Barnes and discovered “some unusual activity,” which specifically included: (1) all invoices from Barnes were under \$2,500.00; (2) some invoices only listed part numbers without part descriptions; (3) some invoices were exactly the same amount with different part numbers; (4) many invoices appeared to have been entered within a few minutes of each other; and (5) multiple attempts to match part numbers with identifiable inventory or installed parts failed.

Kenney prepared charts analyzing the dollar amounts paid to Barnes on their invoices by the School System in June 2003 and June 2004, the end of the respective fiscal years. In June 2003, Barnes was paid \$3.2 million dollars. This amount was “several times larger” than amounts paid in previous months. Kenney found a similar pattern from July 2003 to June 2004.

Kenney also reviewed the billing system and found Barnes billed the School System prior to delivery of merchandise, which was “contrary to the [S]chool [S]ystem procedure.” Kenney discovered many items identified in the prepayment account had not been received and the part numbers listed on the invoices were fictitious.

Bobby Browder (“Browder”) testified for the State against defendant pursuant to his guilty plea. Browder served as Vice President of Store Operations for Barnes and supervised its store in Raleigh. At trial, Browder admitted involvement in a scheme to bill the School System for merchandise neither delivered nor received.

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Browder testified unspent money in the budget would be lost if not spent by the end of each fiscal year. Browder agreed for Barnes to “prebill” the School System for merchandise and essentially give the School Bus Garage credit to purchase against the following fiscal year. Browder explained that the “prebill” monies were not placed in escrow for the School System, but were deposited directly into Barnes’s checking account.

Barnes began to supply the School System with computers, furniture, equipment, and personal items as a part of the “prebill” scheme. Barnes profited by purchasing these items at retail prices and charging the School System an additional thirty percent. Subsequently, Barnes used the “prebill” money to buy items other than supplies for the School System such as a moped, a four-wheeler, carpet, campers, boats, and gift cards with an aggregate value of over \$100,000.00. The prices of the vehicles, merchandise, and gift cards were billed to the School System through fictitious invoices or by deducting the money from the credit accrued from the “prebill.”

Browder testified that he met defendant through Connie Capps (“Capps”), a fellow Barnes employee. Defendant was Capps’s boyfriend at the time. Beginning in June 2003, Browder started writing checks to defendant, Harold Estes Enterprises, and defendant’s Wells Fargo credit card account. Browder testified he did not believe defendant was in the business of buying for or selling merchandise to the School System or to Barnes. Browder wrote checks payable to defendant to reimburse him for items he had purchased “for Wake County.” Checks in the amount of \$10,000.00 or greater were charged back to the School System. Browder testified he knew he was funding and paying for personal items for the benefit of others from the School System’s funds or credits.

State Bureau of Investigation Special Agent Gil Whitford (“Agent Whitford”) investigated this case on behalf of the Wake County District Attorney. Agent Whitford testified he went to defendant’s and Capps’s residence to interview them. Agent Whitford became suspicious when he discovered numerous vehicles parked and other various items stored in defendant and Capps’s backyard including: (1) two new F-150 Ford pick-up trucks; (2) a motor home; (3) a Haul Master trailer; (4) a Suzuki Quadrunner; (5) a Suzuki Quadmaster; (6) a Monterey motorboat; (7) a golf cart; (8) three Honda scooters; (9) a Chevrolet Z-71 pickup truck; (10) two large motorcycles; (11) two medium-sized motorcycles; (12) one Zuma scooter; and (13) a “rover.”

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Agent Whitford interviewed defendant on two separate occasions at his attorney's office. In the interview, defendant stated that he was self-employed, formerly owned a body shop, and was involved in various real estate ventures. When asked about the checks he had received from Barnes, defendant admitted involvement in an arrangement to facilitate the purchase of items for Carol Finch ("Finch"), the Budget and Technology Analyst for the School Bus Garage. Defendant stated he would purchase these items and Barnes would reimburse him, or in many cases, would pay him in advance for expenses he had purportedly incurred on behalf of the School Bus Garage.

During 2003, Barnes paid defendant a total of \$260,612.00. During that time period, defendant paid out \$192,117.87, leaving a difference of \$68,494.13. Similarly, in 2004, Barnes paid defendant \$274,900.00. Defendant paid out \$200,634.61, leaving a difference of \$74,265.39. Over the span of two years, defendant acquired \$142,759.52 by laundering money through his personal and business bank accounts.

Defendant asserted all payments made were on behalf of Finch or the School Bus Garage. Agent Whitford inquired into every expenditure defendant had made during this two-year period and found defendant had a very close relationship with both Capps and Finch, two women who played major roles in the "prebill" scheme. Agent Whitford found defendant participated in expensive shopping trips with Capps and Finch. Defendant would often buy thousands of dollars worth of vehicles and merchandise on "behalf of Finch" and keep them for himself. Agent Whitford also found defendant traveled with Capps and Finch to exotic locations and spent more than \$15,000.00 dollars on these trips. These expenditures were all financed by the monies laundered through defendant's bank accounts for Barnes.

On 25 August 2006, a jury found defendant to be guilty of obtaining property by false pretenses and conspiracy to obtain property by false pretenses. Defendant was sentenced to seventy-three months minimum and ninety-seven months maximum imprisonment and a \$500,000.00 fine for "embezzlement." Defendant was also sentenced to a consecutive sentence of sixty-four months minimum and eighty-six months maximum for conspiracy to obtain property by false pretenses. Defendant appeals.

II. Issues

Defendant argues the trial court erred by: (1) denying his motions to dismiss at the close of the evidence; (2) constructively amending the allegation in the indictment from acting in concert to aiding and

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abetting obtaining property by false pretenses through the jury instructions; and (3) entering judgment against him for “embezzlement” when he was charged with and found to be guilty by a jury of obtaining property by false pretenses.

III. Motions to Dismiss

[1] Defendant argues the trial court committed prejudicial error by denying his motions to dismiss at the close of the evidence. We disagree.

A. Standard of Review

Upon defendant’s motion for dismissal, the question for the court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of such offense. If so, the motion is properly denied. . . . The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.

State v. Powell, 299 N.C. 95, 98-99, 261 S.E.2d 114, 117 (1980) (internal citations and quotations omitted).

B. Analysis

At the close of the State’s evidence, the trial court denied defendant’s motions to dismiss and stated “the relationship of the parties and the conduct of the defendant [were] sufficient [to] infer that the defendant *knowingly aided* in the commission of the crime of the taking property by false pretense” (Emphasis supplied). Our Supreme Court has stated the elements of aiding and abetting are: (1) the crime was committed by some other person; (2) the defendant knowingly advised, instigated, encouraged, procured, or aided the other person to commit that crime; and (3) the defendant’s actions or statements caused or contributed to the commission of the crime by that other person. *State v. Francis*, 341 N.C. 156, 161, 459 S.E.2d 269, 272 (1995).

For a defendant to be found guilty of aiding and abetting, he “must aid or actively encourage the person committing the crime or

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in some way communicate to this person his intention to assist in its commission. The communication or intent to aid . . . may be inferred from his actions and from his relation to the actual perpetrators.” *State v. Goode*, 350 N.C. 247, 260, 512 S.E.2d 414, 422 (1999) (internal citations omitted).

The State’s evidence tended to show defendant lived with Capps and had a very close relationship with Finch, two of the scheme’s principal players. Capps and Finch would bring the phoney invoices home to defendant’s residence for finalizing and processing. Defendant would accompany Capps and Finch on various shopping trips, where he willingly purchased several expensive automobiles “on behalf of Finch” that were actually titled in his or Capps’s name. Defendant gave Finch several thousand dollars in cash for the Fourth of July weekend and on several other occasions for no specific reason. Defendant helped pay off “Finch’s loans,” subsequently found to be Capps’s son’s loans. Defendant also purchased Finch an expensive RV and paid rental for the lot on which it was parked.

Subsequently, defendant purchased yet another RV “on Finch’s behalf,” which sat permanently on a lot in Myrtle Beach, South Carolina. Agent Whitford found that defendant and Capps often travelled to Myrtle Beach and stayed in this particular RV. Defendant purchased jet skis, golf carts, and several vehicles titled in Finch’s name for his use when he traveled to Myrtle Beach. Agent Whitford also found defendant, Capps, and Finch traveled to Mexico and Key West together and spent between \$15,000.00 and \$17,000.00. Defendant was reimbursed for all of these expenditures from Barnes, who charged these expenses back to the School System.

Through defendant’s actions and relationships to the parties, the jury could infer he knowingly and willingly laundered nearly one-half million dollars through his personal and business banking accounts in aiding and abetting Brower, Capps, and Finch in obtaining property by false pretenses from the School System. *Francis*, 341 N.C. at 161, 459 S.E.2d at 272. Viewed in the light most favorable to the State, the evidence at trial was sufficient to withstand defendant’s motions to dismiss for insufficiency of the evidence and to submit the charge of aiding and abetting to the jury. *Powell*, 299 N.C. at 98, 261 S.E.2d at 117. This assignment of error is overruled.

IV. Aiding and Abetting Instructions

[2] Defendant argues the trial court committed prejudicial error in violation of his constitutional rights by constructively amending the

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allegation in the indictment from acting in concert to aiding and abetting obtaining property by false pretenses through its charge to the jury. Defendant argues the jury convicted him on a basis different from that alleged in the bill of indictment. We disagree.

A. Standard of Review

N.C. Gen. Stat. § 15A-923(e) (2005) prohibits the amendment of a bill of indictment. Our Supreme Court has interpreted this statute to mean “a bill of indictment may not be amended in a manner that *substantially alters* the charged offense. In determining whether an amendment is a substantial alteration, we must consider the multiple purposes served by indictments, the primary one being to enable the accused to prepare for trial.” *State v. Silas*, 360 N.C. 377, 380, 627 S.E.2d 604, 606 (2006) (emphasis supplied) (internal citations and quotations omitted).

B. Analysis

A criminal bill of indictment is sufficient “if it express[es] the charge against the defendant in a plain, intelligible, and explicit manner.” N.C. Gen. Stat. § 15-153 (2005). “Specifically, the indictment must allege all of the essential elements of the crime sought to be charged. Allegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage.” *State v. Westbrooks*, 345 N.C. 43, 57, 478 S.E.2d 483, 492 (1996) (internal citations and quotations omitted). This requirement ensures that a defendant may adequately prepare his defense. *Id.* at 58, 478 S.E.2d at 492.

Here, the bill of indictment charged defendant with the offense of obtaining property by false pretenses pursuant to N.C. Gen. Stat. § 14-100. The essential elements of obtaining property by false pretenses are:

- (1) that the representation was made as alleged; (2) that property or something of value was obtained by reason of the representation; (3) that the representation was false; (4) that it was made with intent to defraud; [and] (5) that it actually did deceive and defraud the person to whom it was made.

State v. Carlson, 171 N.C. 818, 824, 89 S.E. 30, 33 (1916). Neither acting-in-concert nor aiding and abetting are essential elements to the crime of obtaining property by false pretenses. Accordingly, we treat either theory of criminal liability as “surplusage.” *Westbrooks*, 345 N.C. at 57, 478 S.E.2d at 492.

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Because our Supreme Court has stated that allegations of whether a defendant was acting in concert or aiding and abetting are “irrelevant and surplusage,” defendant has failed to show that instructing the jury on the basis of one of these theories of guilt “substantially alters the charged offense.” *Silas*, 360 N.C. at 380, 627 S.E.2d at 606. Defendant’s argument that he was unable to adequately prepare his defense for trial against one of the two theories of criminal liability to convict him of obtaining property by false pretenses is without merit. Our Supreme Court has stated “[t]he distinction between [a defendant being found guilty of] aiding and abetting and acting in concert . . . is of little significance. Both are equally guilty.” *State v. Bonnett*, 348 N.C. 417, 440, 502 S.E.2d 563, 578 (1998) (quoting *State v. Williams*, 299 N.C. 652, 656, 263 S.E.2d 774, 777 (1980)), *cert. denied*, 525 U.S. 1124, 142 L. Ed. 2d 907 (1999).

Since our Supreme Court has found “little significance” in the two theories upon which to establish guilt and that allegations of either of these theories of culpability should be treated as “irrelevant and surplusage,” defendant’s argument that the bill of indictment was amended in a manner that “substantially alters” the charged offense by the trial court’s instructions to the jury is without merit. *Silas*, 360 N.C. at 380, 627 S.E.2d at 606. Defendant had timely notice of the charges brought against him to enable him to adequately prepare his defense for trial. *Id.* Defendant was not convicted of a crime different from that alleged in the bill of indictment. Defendant was charged with and convicted of obtaining property by false pretenses. This assignment of error is overruled.

V. Judgment and Commitment Order

[3] Defendant argues the trial court erred by entering judgment against him for “embezzlement” when he was charged with and found to be guilty by a jury of obtaining property by false pretenses. The State acknowledges this clerical error and joins in defendant’s argument to remand for clarification of the record.

N.C. Gen. Stat. § 15A-1301 (2005) states, in relevant part, “[w]hen the commitment is to a sentence of imprisonment, the commitment must include the identification and class of the offense or offenses for which the defendant was convicted.” Here, the transcript and the jury’s verdict form indicate defendant was found to be guilty by a jury of obtaining property by false pretenses. The trial court made a clerical error by listing the charge in the judgment and commitment in 05

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CRS 082472 as “embezzlement” pursuant to N.C. Gen. Stat. § 14-90 rather than obtaining property by false pretenses pursuant to N.C. Gen. Stat. § 14-100. This case is remanded to the trial court for the limited purpose of correcting this clerical error in the judgment and commitment in 05 CRS 082472.

VI. Conclusion

The trial court properly denied defendant’s motions to dismiss for insufficiency of the evidence. The State presented sufficient evidence at trial that defendant knowingly aided multiple persons in obtaining property by false pretenses, by laundering nearly one-half million dollars through his personal and business banking accounts. The trial court did not constructively amend the bill of indictment by submitting aiding and abetting instructions to the jury.

The trial court erred by listing the incorrect offense of which defendant was convicted in the judgment and commitment in 05 CRS 082472. This case is remanded to the trial court for the limited purpose of correcting this clerical error.

No Error and Remanded for Correction of Clerical Error.

Judges HUNTER and GEER concur.

STATE OF NORTH CAROLINA v. CHARLES A. McARTHUR, DEFENDANT

No. COA06-1465

(Filed 16 October 2007)

1. Criminal Law— instructions—self-defense—proof beyond a reasonable doubt of every element

The trial court erred in a felonious assault prosecution in which the jury was instructed to return a verdict of not guilty if it found that defendant acted in self-defense by failing to also specifically instruct the jury that it should return a verdict of not guilty if it concluded that the State failed to prove any of the elements beyond a reasonable doubt.

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2. Criminal Law— pattern jury instructions—self-defense—ambiguity

There is an ambiguity in the pattern jury instruction regarding self-defense: read literally, the instruction states that the elements of self-defense must be found beyond a reasonable doubt, suggesting that defendant bears the burden of proof. Trial judges are urged to take care in using the pattern self-defense instruction and to edit it to ensure that the burden of proof is correctly placed.

Appeal by defendant from judgment entered 2 March 2006 by Judge Thomas Haigwood in Wake County Superior Court. Heard in the Court of Appeals 23 May 2007.

Attorney General Roy Cooper, by Assistant Attorney General Sandra Wallace-Smith, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defenders Kristen L. Todd and Benjamin Dowling-Sendor, for defendant-appellant.

GEER, Judge.

Defendant Charles A. McArthur appeals from his conviction for assault with a deadly weapon inflicting serious injury with the intent to kill. Our Supreme Court has repeatedly awarded a new trial when, as here, the trial court instructed the jury that it must return a verdict of not guilty upon a determination that defendant acted in self-defense, but failed to specifically instruct the jury to return a verdict of not guilty if it concluded the State failed to prove the elements of the crime beyond a reasonable doubt. *See, e.g., State v. Dallas*, 253 N.C. 568, 569, 117 S.E.2d 415, 416 (1960) (per curiam). We, therefore, remand this case for a new trial.

Facts

The State's evidence at trial tended to show the following facts. Defendant had been dating Mia Boyd, a neighbor of Christopher Hinton and Robert Peyton, and the mother of one of Hinton's and Peyton's friends. On the evening of 25 May 2005, defendant chased Boyd to Peyton's house, and Hinton and Peyton witnessed defendant push her up against a wall.

It is undisputed that on the following day, 26 May 2005, defendant crossed paths with Hinton and Peyton, a confrontation took place,

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and defendant cut Hinton's neck with a box cutter. Hinton was treated at a local hospital where he received 13 stitches.

Hinton testified at trial that defendant approached Peyton and him at Peyton's house. Defendant accused Hinton of "being in his business," asked Hinton if he wanted to fight, and then slashed Hinton's neck with the box cutter. Peyton testified in a substantially similar fashion, but added that defendant smelled of alcohol.

Defendant testified in his own defense that the altercation took place near the curb in front of defendant's yard. He stated that Hinton and Peyton started the fight by "throw[ing]" words at defendant from the street. According to defendant, Hinton and Peyton then approached him, and Hinton became so enraged and got so close to defendant's face that Hinton spit on defendant's face as he spoke. Defendant testified that he thought Hinton was about to "pull[] something out" and attack him. Defendant then swung the box cutter and sliced Hinton's neck.

On 11 July 2005, defendant was indicted for assault with a deadly weapon inflicting serious injury with intent to kill. Following the presentation of the evidence, the trial court instructed the jury that it was to consider four possible verdicts: (1) guilty of assault with a deadly weapon with the intent to kill inflicting serious injury; (2) guilty of assault with a deadly weapon inflicting serious injury; (3) guilty of assault with a deadly weapon; or (4) not guilty. The court also instructed the jury as to self-defense. The jury found defendant guilty of assault with a deadly weapon with the intent to kill inflicting serious injury. The trial court sentenced defendant within the presumptive range to 128 to 163 months imprisonment. Defendant now appeals to this Court.

Discussion

[1] Defendant argues that the trial court erred by failing to specifically instruct the jury that it should return a verdict of not guilty if it concluded that the State failed to prove any of the elements of the charged assault beyond a reasonable doubt. The parties dispute whether defendant has sufficiently preserved this issue for appellate review.

Generally, "[a] party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict" N.C.R. App. P. 10(b)(2). Here, defendant requested, and the trial court agreed, to present the

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jury with three North Carolina Pattern Instructions applicable to assault with a deadly weapon. Each of the pattern instructions contains a concluding paragraph stating: “If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.” *See* N.C.P.I.—Crim. 208.10 (2002) (assault with deadly weapon with intent to kill inflicting serious injury); *see also* N.C.P.I.—Crim. 208.15 (2002) (assault with deadly weapon inflicting serious injury); N.C.P.I.—Crim. 208.50 (2002) (assault with deadly weapon). Although the trial court failed to specifically read these paragraphs when charging the jury, defendant did not object.

Nevertheless, our Supreme Court has concluded that “a request for an instruction at the charge conference is sufficient compliance with [Rule 10(b)(2)] to warrant our full review on appeal where the requested instruction is subsequently promised but not given, notwithstanding any failure to bring the error to the trial judge’s attention at the end of the instructions.” *State v. Ross*, 322 N.C. 261, 265, 367 S.E.2d 889, 891 (1988). Thus, once the trial court agreed to provide the requested pattern instructions, defendant was not required to object to their alteration to preserve the issue for review. *See also State v. Jaynes*, 353 N.C. 534, 556, 549 S.E.2d 179, 196 (2001) (“[W]hen the instruction actually given by the trial court varied from the pattern language, defendant was not required to object in order to preserve this question for appellate review.”), *cert. denied*, 535 U.S. 934, 152 L. Ed. 2d 220, 122 S. Ct. 1310 (2002); *State v. Keel*, 333 N.C. 52, 56-57, 423 S.E.2d 458, 461 (1992) (holding defendant could challenge jury instruction on appeal, regardless of failure to object, when trial court gave different instruction than the one it agreed to give during charge conference).

At the beginning of the trial court’s instructions to the jury, before the court addressed the elements of the charges listed on the verdict sheet, the court instructed the jury generally: “You should weigh all of the evidence in the case. After weighing all of the evidence, if you’re not convinced of the guilt of the defendant beyond a reasonable doubt, you must find him not guilty.” After giving another preliminary instruction defining “intent,” the court then instructed the jury as to each of the charges listed on the verdict sheet. After instructing as to the elements of the charges, the court proceeded to explain the law regarding self-defense. He then concluded the instructions regarding the charges by stating in his final mandate:

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So I charge that if you find from the evidence beyond a reasonable doubt that the defendant is guilty of an assault with a deadly weapon with intent to kill inflicting serious injury, or that he's guilty of an assault with a deadly weapon inflicting serious injury, or that he's guilty of an assault with a deadly weapon, you may return a verdict of guilty only if the State has satisfied you also beyond a reasonable doubt that the defendant's action was not in self-defense; that is, that the defendant did not reasonably believe the assault was necessary or apparently necessary to protect himself from death or seriously [sic] bodily injury, or that he used excessive force or that he was the aggressor.

If you did not so find or have a reasonable doubt, then the defendant's action would be justified by self-defense, and thereof it would be your duty to return a verdict of not guilty.

Nowhere during the instructions on the elements of the crimes or self-defense did the trial court specifically instruct the jury that it was also required to return a verdict of not guilty if it found that the State failed to prove beyond a reasonable doubt any of the elements of the crimes.

We cannot meaningfully distinguish this case from decisions of our Supreme Court, including *Dallas*, 253 N.C. at 569, 117 S.E.2d at 416; *State v. Ramey*, 273 N.C. 325, 329, 160 S.E.2d 56, 59 (1968); and *State v. Woods*, 278 N.C. 210, 217, 179 S.E.2d 358, 363 (1971), *overruled on other grounds by State v. McAvoy*, 331 N.C. 583, 417 S.E.2d 489 (1992). Notably, although defendant discussed all three decisions, the State has only attempted to distinguish *Dallas*. It has not addressed *Ramey* or *Woods* at all.

In *Dallas*, the trial court charged the jury that it could return one of three verdicts: guilty of murder in the second degree, guilty of manslaughter, or not guilty on the grounds of self-defense. 253 N.C. at 569, 117 S.E.2d at 415-16. The Supreme Court observed: "The charge as a whole limits the authority of the jury to return a verdict of not guilty to a finding of 'not guilty by reason of self-defense.' *At no time was the jury instructed that, if upon a fair and impartial consideration of the evidence they had a reasonable doubt of defendant's guilt, it would be their duty to acquit him.* In effect the court instructed the jury that defendant was not entitled to an acquittal unless he satisfied the jury that he had acted in self-defense." *Id.*, 117 S.E.2d at 416 (emphasis added).

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The State selectively quotes from *Dallas*, inappropriately replacing the italicized portion of the above quote with an ellipsis. As in *Dallas*, the jurors in this case were never charged that if they had a reasonable doubt regarding defendant's guilt, it would be their duty to acquit him. When one reads *Dallas*' holding in its entirety—without the strategic omission—it mandates a new trial. *Id.*

The Supreme Court reached an identical conclusion in *Ramey*. In *Ramey*, the trial court had given an instruction very similar to the one in this case, setting out the elements of second degree murder and manslaughter, followed by the elements of self-defense, and concluding that if the jury found to its satisfaction that the defendant acted in self-defense, "it would be your duty to render a verdict of not guilty in this case." 273 N.C. at 328, 160 S.E.2d at 58 (emphasis omitted). The Court observed that "[t]he only portions of the charge in which the jury was instructed as to circumstances under which they might return a verdict of not guilty relate directly and solely to the return of a verdict of not guilty in the event the jury found defendant acted in the lawful exercise of his right of self-defense." *Id.* The Court then held:

In our opinion, and we so decide, defendant was entitled to an explicit instruction, even in the absence of a specific request therefor, to the effect the jury should return a verdict of not guilty if the State failed to satisfy them from the evidence beyond a reasonable doubt that a bullet wound inflicted upon [the victim] by defendant proximately caused his death. The trial judge inadvertently failed to give such instruction. The necessity for such instruction is not affected by the fact there was plenary evidence upon which the jury could base a finding that a bullet wound inflicted upon [the victim] by defendant proximately caused his death.

As indicated, the quoted excerpt from the charge was the court's final instruction to the jury. It is noted that no instruction was given that if the State failed to satisfy the jury from the evidence beyond a reasonable doubt that defendant was guilty of murder in the second degree, and failed to satisfy the jury from the evidence beyond a reasonable doubt that defendant was guilty of manslaughter, the jury should return a verdict of not guilty.

Id. at 329, 160 S.E.2d at 59 (internal citation omitted). Based on that omission—even though no specific request had been made for the

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omitted instruction—the Court awarded a new trial. *Id.* at 330, 160 S.E.2d at 59.

The Court addressed the issue a third time in *Woods*. The trial court in *Woods* instructed the jury as follows:

If the State has satisfied you beyond a reasonable doubt that defendant, by means of a deadly weapon, intentionally inflicted the wound which produced [the victim's] death it would be your duty to return a verdict of guilty of murder in the second degree unless defendant has satisfied you that she shot [the victim] in self-defense. If you are satisfied beyond a reasonable doubt that defendant intentionally shot [the victim] and that his death was the natural and probable result, but you are not satisfied beyond a reasonable doubt that she shot him with malice, your verdict will be voluntary manslaughter unless defendant has satisfied you she shot [the victim] in self-defense. If you are not satisfied beyond a reasonable doubt that defendant shot [the victim] intentionally but are satisfied beyond a reasonable doubt that she shot him in the commission of some unlawful act and his death was a natural and probable result, your verdict will be guilty of involuntary manslaughter even though the wounding of the deceased was unintentional, unless defendant has satisfied you she shot in self-defense. Although the State may have satisfied you beyond a reasonable doubt that defendant shot and killed [the victim], if she has satisfied you that she was not the aggressor and that she shot [the victim] under circumstances which created in her mind the reasonable belief that it was necessary to shoot him in order to save herself from death or great bodily harm, it would be your duty to return a verdict of not guilty.

278 N.C. at 214-15, 179 S.E.2d at 361 (internal quotation marks omitted). The Supreme Court observed that although the trial court had instructed the jury as to the circumstances under which they could return a verdict of guilty, “it was only in the event they found defendants to have acted in lawful self-defense that he specifically told them they could or should return a verdict of not guilty.” *Id.* at 215, 179 S.E.2d at 361. The Court then held that the defendant “was, therefore, entitled to the explicit instruction, even in the absence of a specific request therefor, that the jury should return a verdict of not guilty if the State failed to prove beyond a reasonable doubt that a bullet wound inflicted by defendant proximately caused [the victim's] death.” *Id.* at 216, 179 S.E.2d at 362. As in *Ramey* and *Dallas*, because

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of the omission, the Court awarded a new trial. *Id.* at 217, 179 S.E.2d at 363.

Here, defendant's plea of not guilty "placed the burden upon the State to satisfy the jury beyond a reasonable doubt of every element of the offenses charged in the bill of indictment." *State v. Overman*, 257 N.C. 464, 466-67, 125 S.E.2d 920, 923 (1962). As *Dallas, Ramey*, and *Woods* expressly held, defendant was, therefore, entitled to a specific instruction that if the jury determined that the State failed to prove any of the elements of the charges, it should return a verdict of not guilty. The State's contention that the trial court's instruction requiring the State to prove the elements beyond a reasonable doubt was sufficient cannot be reconciled with our Supreme Court's holdings. *See also State v. McHone*, 174 N.C. App. 289, 298, 620 S.E.2d 903, 910 (2005) (noting that a new trial has been awarded for failure to provide a not guilty final mandate even when the trial court has given instructions on burden of proof or presumption of innocence), *disc. review denied*, 362 N.C. 368, 628 S.E.2d 9 (2006).

The statement in the preliminary portion of the trial court's instructions that "if you're not convinced of the guilt of the defendant beyond a reasonable doubt, you must find him not guilty," also did not solve the problem since the trial court had not yet explained what was entailed in establishing the guilt of defendant. *See State v. Chapman*, 359 N.C. 328, 380, 611 S.E.2d 794, 831 (2005) ("Every criminal jury must be instructed as to its right to return, and the conditions upon which it should render, a verdict of not guilty. Such instruction is generally given during the final mandate after the trial court has instructed the jury as to elements it must find to reach a guilty verdict." (internal citations and quotation marks omitted)); *State v. Ward*, 300 N.C. 150, 156-57, 266 S.E.2d 581, 585 (1980) ("By failing to give the converse or alternative view that acquittal should result if the jury were not satisfied beyond a reasonable doubt as to each and every stated element, the trial judge failed to provide even a general application of the law to the evidence raised by defendant's testimony.").

In light of controlling Supreme Court precedent, we are required to award defendant a new trial because of the trial court's failure to include a specific instruction directing the jury to enter a verdict of not guilty if it found that the State had failed to prove any of the elements of the charged crimes beyond a reasonable doubt. We do not address defendant's remaining arguments since they may not be repeated during subsequent proceedings.

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[2] We do observe, however, that there appears to be an ambiguity in the pattern jury instruction regarding self-defense. The trial court substantially modeled its instructions on N.C.P.I.—Crim. 308.45 (2003), which states:

If from the evidence you find beyond a reasonable doubt that the defendant assaulted the victim with deadly force; that is, force likely to cause death or great bodily harm and that the circumstances would have created a reasonable belief in the mind of a person of ordinary firmness that the assault was necessary or apparently necessary to protect himself from death or great bodily harm, and the circumstances did create such belief in the defendant's mind at the time he acted, such assault would be justified by self-defense. You, the jury, determine the reasonableness of the defendant's belief from the circumstances appearing to him at the time.

(Emphasis added.) This instruction—read literally—states that the elements of self-defense must be found beyond a reasonable doubt, suggesting that a defendant bears the burden of proof. It is, however, well established that the burden of proving that the defendant did not act in self-defense is on the State. *See State v. Hankerson*, 288 N.C. 632, 643, 220 S.E.2d 575, 584 (1975) (rejecting, under Due Process Clause of Fourteenth Amendment, “long-standing rule” that defendant must prove to satisfaction of jury that he killed in self-defense in order to rebut presumption that killing was unlawful), *rev'd on other grounds*, 432 U.S. 233, 53 L. Ed. 2d 306, 97 S. Ct. 2339 (1977). We urge trial judges to take care in using the pattern self-defense instruction and edit it in order to ensure that the burden of proof is correctly placed on the State throughout the instructions.

New trial.

Judges HUNTER and ELMORE concur.

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STATE OF NORTH CAROLINA, PLAINTIFF v. SHEILA NEWMAN, DEFENDANT

No. COA06-1523

(Filed 16 October 2007)

1. Appeal and Error— appealability—interlocutory order—dismissal of one count while another pending

Defendant's motion to dismiss the State's appeal from the dismissal with prejudice of one count against defendant for resisting, delaying or obstructing a public officer (RDO) while there was still another count pending for trespassing is denied even though defendant contends the appeal is from an interlocutory order, because: (1) in the instant case there was a decision, dismissal of the charge of RDO, but not a judgment since a sentence was not pronounced; and (2) if the legislature had intended that the State not be able to appeal unless and until the court dismissed all counts against a defendant or entered a judgment, N.C.G.S. § 15A-1445(a)(1) would not refer to a decision or dismissal of one or more counts.

2. Appeal and Error— appealability—double jeopardy—jury must be sworn in criminal case

The trial court did not err by denying defendant's motion to dismiss the State's appeal from an order dismissing one of two criminal charges pending against defendant based on double jeopardy, because: (1) in a criminal case, jeopardy does not attach until a competent jury has been empaneled and sworn; and (2) defendant made her oral motion to dismiss before jury selection had even begun.

3. Constitutional Law— double jeopardy—resisting, delaying, or obstructing officer—acquittal of assaulting official—same evidence test

Defendant's right against double jeopardy was not violated by the prosecution of defendant on a charge of resisting, delaying or obstructing a public officer (RDO) in the superior court after defendant was acquitted of a charge of assault on a government official in the district court where the charge of RDO was based upon defendant "pulling away and elbowing at the officer" while the charge of assault on a government official was based upon defendant "elbowing" the officer; defendant need not have been under arrest in order for her "pulling away" from the officer

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to sustain a conviction of RDO; and the charges of RDO and assault on a government official were thus not based upon the same evidence.

Appeal by the State from judgment entered 9 August 2006 by Judge Abraham Penn Jones in Superior Court, Vance County. Heard in the Court of Appeals 7 June 2007.

Attorney General Roy A. Cooper, III by Assistant Attorney General, Chris Z. Sinha for the State.

Stubbs, Cole, Breedlove, Prentis & Biggs, PLLC, by C. Scott Holmes for Defendant-Appellee.

STROUD, Judge.

This matter is before the Court on the State's appeal from the trial court order dismissing one of two criminal charges pending against defendant Sheila Newman. We reverse the trial court's dismissal of the charge of resisting, delaying or obstructing a public officer.

I. Background

On 6 March 2004, defendant was charged with second degree trespass ("trespass"), resisting, delaying or obstructing a public officer¹ ("RDO"), and assault on a government official. Henderson Police Department Officer K. M. Riddick was investigating a call concerning a disruptive customer at Sally Reid's Junk Shack ("Junk Shack"). All of defendant's charges arose out of an incident that occurred on 6 March 2004 at the Junk Shack.

On 26 July 2004, defendant pled not guilty to all the charges and was tried in District Court, Vance County. District Court Judge Daniel Finch found defendant guilty of trespass and RDO. However, Judge Finch found defendant not guilty of assault on a government official. On 29 July 2004, defendant filed notice of appeal from the judgment entered upon her convictions in district court for trespassing and RDO.

This matter was heard in Superior Court, Vance County on or about 9 August 2006 before Judge Abraham Penn Jones. Defendant made an oral motion to dismiss both charges. After hearing argument

1. If any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a Class 2 misdemeanor. N.C. Gen. Stat. § 14-223 (2003).

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from both parties, the trial court granted defendant's motion as to the charge of RDO and denied defendant's motion as to the charge of trespassing. Thereafter, the State moved to continue trial on the charge of trespassing. Judge Jones indicated that he would prefer to proceed with the trial, after which the court took a brief recess. Upon return from the recess, the State gave notice of appeal from the court's dismissal of the charge of RDO. The State then renewed its motion to continue the trial on the charge of trespassing, which the trial court granted. On 15 March 2007, defendant moved to dismiss the State's appeal arguing, in part, that the trial court order dismissing one of two criminal charges pending against defendant is interlocutory.

II. Defendant's Motion to Dismiss on the Grounds of an Interlocutory Appeal

[1] The State's right to appeal in this matter is governed by N.C. Gen. Stat. § 15A-1445(a)(1): "(a) Unless the rule against double jeopardy prohibits further prosecution, the State may appeal from the superior court to the appellate division: (1) When there has been a decision or judgment dismissing criminal charges as to one or more counts." N.C. Gen. Stat. § 15A-1445(a)(1) (2005). In this case, the charging document contained three counts. One was dismissed in District Court, one was dismissed in Superior Court, and one is still pending in Superior Court.

"As a general rule an appeal will not lie until there is a final determination of the whole case. It lies from an interlocutory order only when it puts an end to the action or where it may destroy or impair or seriously imperil some substantial right of the appellant." *State v. Ward*, 46 N.C. App. 200, 204, 264 S.E.2d 737, 740 (1980) (internal citation and quotations omitted).

This Court held in *Ward* that an order dismissing a charge *without* prejudice was not a final order and therefore dismissed the state's appeal as interlocutory under N.C. Gen. Stat. § 15A-1445. *Id.* at 204-05, 263 S.E.2d 737, 740-41. We find no case addressing an appeal by the State of the dismissal with prejudice of one count against a defendant where there is still another count pending. We must therefore examine the language of N.C. Gen. Stat. § 15A-1445(a)(1). *See* N.C. Gen. Stat. § 15A-1445(a)(1).

The language of this statute is not ambiguous, and so "we use accepted principles of statutory construction by applying the plain and definite meaning of the words therein" to analyze the statute.

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State v. Bryant, 361 N.C. 100, 102, 637 S.E.2d 532, 534 (2006). N.C. Gen. Stat. § 15A-1445(a)(1) permits the State to appeal from a “*decision or judgment* dismissing criminal charges as to *one or more counts*.” N.C. Gen. Stat. § 15A-1445(a)(1) (emphasis added).

Entry of judgment in a criminal case is defined by N.C. Gen. Stat. § 15A-101 as follows: “Judgment is entered when sentence is pronounced.” N.C. Gen. Stat. § 15A-101(4a) (2005). The trial court did not pronounce a sentence in this case and thus there was no “judgment”. See *id.* Therefore we must consider if the trial court made a “decision”. See N.C. Gen. Stat. § 15A-1445(a)(1).

We find no statutory definition of “decision” for purposes of Chapter 15A and no formal definition of “decision” in our case law. Black’s Law Dictionary defines “decision” as

[a] determination arrived at after consideration of facts, and, in legal context, law.

A determination of a judicial or quasi judicial nature. A judgment or decree pronounced by a court in settlement of a controversy submitted to it and by way of authoritative answer to the questions raised before it. The term is broad enough to cover both final judgments and interlocutory orders.

Black’s Law Dictionary 366 (5th ed. 1979). “While a final judgment always is a final decision, there are instances in which a final decision is not a final judgment.” *Stack v. Boyle*, 342 U.S. 1, 12, 96 L. Ed. 3, 10 (1951) (Jackson, J., separate opinion).

In this case, there was a decision, dismissal of the charge of RDO, but not a judgment because a sentence was not pronounced. See *Black’s Law Dictionary* 366, N.C. Gen. Stat. § 15A-101(4a) (2005). The trial court did make a “decision” on *one count* of the charges against defendant. See *Black’s Law Dictionary* 366. The statute permits appeal from a “decision” as well as a “judgment.” See N.C. Gen. Stat. § 15A-1445(a)(1). If the legislature had intended that the State not be able to appeal unless and until the court dismissed *all counts* against a defendant or entered a “judgment”, the statute would not refer to a “decision” or dismissal of “one or more counts.” See *id.* Therefore, under the plain language of N.C. Gen. Stat. § 1445(a)(1), the State has a right to appeal the dismissal of one count and this appeal is not interlocutory. See *id.*

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III. Defendant's Motion to Dismiss on the Grounds
of Double Jeopardy

[2] In addition to arguing the State's appeal was interlocutory in her motion to dismiss, defendant argued the appeal should be dismissed because double jeopardy had attached. The State may "appeal the dismissal of criminal charges only when further prosecution would not be barred by the rule against double jeopardy." *State v. Priddy*, 115 N.C. App. 547, 550, 445 S.E.2d 610, 613, *disc. rev. denied*, 337 N.C. 805, 449 S.E.2d 751 (1994); *see also* N.C. Gen. Stat. § 15A-1445(a)(1). However, in a criminal trial such as this, jeopardy does not attach until "a competent jury has been empaneled and sworn." *Id.* at 550, 445 S.E.2d at 613. Defendant made her oral motion to dismiss before jury selection had even begun. Jeopardy had not attached. *See id.* We therefore deny defendant's motion to dismiss this appeal on the grounds of double jeopardy.

IV. Double Jeopardy

[3] We must next consider the substantive grounds of this appeal, whether the trial court erred in dismissing the charge of RDO on the grounds of double jeopardy. Defendant made an oral motion to dismiss the charge of RDO based upon the argument that the same evidence which was presented against her in the district court trial would be used against her again in the superior court trial of the RDO charge. Defendant argued this would violate her constitutional protection from double jeopardy under the United States Constitution. *See* U.S. Const. amend. V. The trial court granted the defendant's motion to dismiss the RDO charge.

The standard of review for this issue is *de novo*, as the trial court made a legal conclusion regarding the defendant's exposure to double jeopardy. *See State v. Ross*, 173 N.C. App. 569, 573, 620 S.E.2d 33, 36 (2005), *aff'd, per curiam*, 360 N.C. 355, 625 S.E.2d 779 (2006). A trial court's legal conclusions are reviewable *de novo*. *Id.*

The Double Jeopardy clause of the Fifth Amendment of the United States Constitution is applicable to the states through the 14th Amendment. *Id.* The clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb[.]" U.S. Const. amend. V. "It is well established that the Double Jeopardy Clause of the North Carolina and United States Constitutions protect against (1) a second prosecution after acquittal for the same offense, (2) a second prosecution after conviction for the same offense, and

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(3) multiple punishments for the same offense.” *State v. Priddy*, 115 N.C. App. 547, 550, 445 S.E.2d 610, 613 (1994) (citation and internal quotations omitted) (discussing *State v. Gardner*, 315 N.C. 444, 451, 340 S.E.2d 701, 707 (1986)).

“In determining whether two indictments are for the same offense, our courts have used the same-evidence test.” *State v. Allah*, 168 N.C. App. 190, 196, 607 S.E.2d 311, 315, *disc. rev. denied*, 359 N.C. 636, 618 S.E.2d 232 (2005) (internal quotations omitted). “This test asks two somewhat alternative questions: 1) whether the facts alleged in the second indictment if given in evidence would have sustained a conviction under the first indictment, or 2) whether the same evidence would support a conviction in each case.” *State v. Ray*, 97 N.C. App. 621, 624, 389 S.E.2d 422, 424 (1990). We must apply the same evidence test to determine if the indictments for assault on a government official and RDO are for the same offense. *See Allah*, 168 N.C. App. at 196, 607 S.E.2d at 315.

The North Carolina Supreme Court has already determined that RDO is neither the same nor a lesser included offense of assault on a government official. *State v. Hardy*, 298 N.C. 191, 197, 257 S.E.2d 426, 430 (1979). However, the Court also stated in *Hardy* that its holding did “not eliminate the possibility that the facts in a given case might constitute a violation of [double jeopardy]. In such a case the defendant could not be punished twice for the same conduct. It was so held in *State v. Summrell*, 282 N.C. 157, 192 S.E.2d 569 (1972).”² *Id.* at 198, 257 S.E.2d at 431. Though RDO is neither the same nor a lesser included offense of assault on a government official this court must still apply the same-evidence test as there is a “possibility that the facts in a given case might constitute a violation of [double jeopardy].” *See id.* at 197-98, 257 S.E.2d at 430-31.

This Court has previously considered a situation almost identical to defendant’s in the case of *State v. Bell*, 164 N.C. App. 83, 594 S.E.2d 824 (2004). In *Bell*, the defendant was charged with assaulting a government official and RDO. *Id.* at 86, 594 S.E.2d at 826. She was found not guilty of assault on a government official and guilty of RDO in district court and she appealed the RDO conviction to superior court. *Id.* She was then tried in superior court and objected to the admission of evidence against her which had also been presented before the district court. *Id.* at 87, 594 S.E.2d at 826. The only relevant procedural

2. *State v. Summrell*, 282 N.C. 157, 192 S.E.2d 569 (1972) was overruled in part on other grounds by *State v. Barnes*, 324 N.C. 539, 380 S.E.2d 118 (1989).

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differences between *Bell* and the case *sub judice* is that in *Bell* the trial court did proceed with the trial of the RDO charge in superior court, and in the present case defendant does challenge the State's ability to prosecute her for RDO in superior court. *See Bell* at 86-89, 594 S.E.2d at 826-28. The defendant in *Bell* claimed that her constitutional protection against double jeopardy was violated because collateral estoppel barred the State from presenting evidence which was previously used against her in district court. *Id.* at 90, 594 S.E.2d at 828. This Court disagreed and affirmed the trial court's decision. *Id.*, 164 N.C. App. 83, 594 S.E.2d 824.

The record in the case *sub judice* does not contain a transcript of the district court trial in which defendant was acquitted of assault on a government official and convicted of RDO, and no evidence was presented before the superior court prior to the dismissal. Thus, we can consider only the allegations in the warrants, regarding defendant's conduct. On the assault on a government official charge, the warrant states that the defendant assaulted the officer by "elbowing" him. On the RDO charge, the warrant states that defendant was "pulling away and elbowing at the officer." Defendant argues that her "pulling away" was justified, and thus the only evidence the State has for both the RDO and the assault on a government official charge is "elbowing."

We do not however find defendant's "pulling away" justified. Although the trial court made no findings of fact and the order did not state the reason for the dismissal, from the transcript it appears that the trial judge granted the motion to dismiss because the defendant was not "under arrest" at the time she allegedly "pulled away" from the officer. However, a defendant need not be "under arrest" or even in the process of being arrested in order to be guilty of RDO. *See State v. Lynch*, 94 N.C. App. 330, 332, 380 S.E.2d 397, 398 (1989). "The conduct proscribed under G.S. 14-223 is not limited to resisting an arrest but includes any resistance, delay, or obstruction of an officer in the discharge of his duties. . . . [D]efendant's conviction may be based upon his conduct prior to the time of his actual arrest." *Id.* (indictment alleged that "defendant attempted to run from and struggled with the officers while they were attempting to ascertain defendant's identity"). Defendant does not dispute that Officer Riddick was discharging or attempting to discharge a duty of his office when he responded to investigate a call of a "disruptive customer" at the Junk Shack, and that defendant was the alleged "disruptive customer."

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Even defendant's "pulling away" from the officer as he attempted to discharge his duty by investigating the call would be sufficient to sustain the charge of RDO, as this action could have "delayed" or "obstructed" his investigation. *See State v. Leigh*, 278 N.C. 243, 249, 179 S.E.2d 708, 711 (1971) (finding that even though "no actual violence or force was used by defendant . . . there was plenary evidence to support a jury finding that defendant did by his actions and language delay and obstruct the officer in the performance of his duties").

Finding, as we have, that defendant's "pulling away" was not justified we apply the same evidence test and find that the evidence is not in fact the same as the RDO warrant was validly based on defendant "pulling away and elbowing at the officer" whereas the assault was only based on the defendant "elbowing" the officer. *See State v. Ray*, 97 N.C. App. 621, 624, 389 S.E.2d 422, 424 (1990).

The State in *Bell* had the ability to prosecute defendant for RDO in superior court using the same evidence as in district court without violation of defendant's double jeopardy protection, and thus the trial court's order of dismissal in the case *sub judice* should be reversed. *See Bell*, 164 N.C. App. 83, 594 S.E.2d 824. The State did have the right to prosecute defendant on both the assault on a government official and RDO charges, without placing defendant in double jeopardy, as the evidence required to convict defendant on the RDO charge is not the same as for the assault on a government official charge. *See id.*; *see also State v. Hardy*, 298 N.C. 191, 197, 257 S.E.2d 426, 430. Thus, based upon *Bell*, the trial court erred in granting the defendant's motion to dismiss the RDO charge. We therefore reverse the trial court's order of dismissal and remand to the superior court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Judges ELMORE and STEELMAN concur.

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[186 N.C. App. 390 (2007)]

WILLIE B. DUVAL, PLAINTIFF v. OM HOSPITALITY, LLC, D/B/A DAYS INN, AND DAYS
INNS WORLDWIDE, INC., DEFENDANTS

No. COA06-1359

(Filed 16 October 2007)

**1. Appeal and Error— appealability—interlocutory order—
jurisdictional—not raised by parties**

Whether an appeal is interlocutory is jurisdictional and the issue was addressed in this case even though the parties did not raise the issue.

**2. Appeal and Error— appealability—summary judgment as
to only one party—voluntary dismissal without prejudice**

A summary judgment which did not dispose of the issues as to all parties was not dismissed as interlocutory where there had been a voluntary dismissal without prejudice as to the remaining party, the time for refileing that claim had expired, and the stipulation of dismissal did not contain language purporting to extend the time. The Court of Appeals did not believe that counsel was manipulating the Rules of Civil Procedure in an attempt to appeal an order that should not be appealable.

3. Appeal and Error— appealability—partial summary judgment—contributory negligence

Partial summary judgment was not interlocutory where the issue was contributory negligence, and granting the motion for summary judgment as to contributory negligence completely disposed of the case.

4. Negligence— darkened motel staircase—contributory negligence—summary judgment

The trial court erred by granting summary judgment for a motel owner on the basis of contributory negligence in an action by a guest who fell in a darkened staircase. A jury could find that plaintiff knew that the stairwell was dark and should have found another way out of the motel, but could also find that plaintiff was not aware of any other way out of the motel and used proper care in descending the dark stairs.

5. Negligence— darkened motel staircase—summary judgment

The trial court correctly denied defendant's summary judgment motion on the issue of negligence in an action arising from a motel guest falling when descending a darkened staircase.

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Appeal by plaintiff, Willie B. Duval and defendant, OM Hospitality, LLC, d/b/a Days Inn from the judgment entered 27 June 2006 by Judge Robert D. Lewis in Superior Court, Buncombe County. Heard in the Court of Appeals 26 April 2007.

George W. Moore for Plaintiff-Appellant.

Brotherton Ford Yeoman & Berry, PLLC by Steven P. Weaver for Defendant/Appellee/Cross-Appellant.

STROUD, Judge.

Plaintiff filed a complaint on 25 October 2005 against defendants OM Hospitality, LLC, d/b/a Days Inn (“OMH”) and Days Inn Worldwide, Inc.¹ (“Day’s Inn”) alleging a claim for personal injury based upon defendant OMH’s negligence. Defendant OMH filed a motion for summary judgment on 8 June 2006 which was denied as to defendant’s actionable negligence and allowed as to plaintiff’s contributory negligence on 27 June 2006. Plaintiff and defendant OMH appeal.

I. Background

On 26 October 2002, plaintiff and her husband were guests at a Days Inn motel (“motel”). At about 6:30 a.m., they left their motel room, and plaintiff alleged it was necessary to walk down an unlit, dark stairwell to exit the motel. Plaintiff alleged there was no light in the stairwell because a light timer which controlled the light in the stairwell had been deactivated. Plaintiff testified in her deposition that it was “pitch dark” out and that it was so dark that plaintiff could not see the steps. Plaintiff tripped and fell while descending the stairs, and the fall caused injuries to her nose, forehead, right arm, and left leg.

In her verified answer to interrogatories from defendant, plaintiff described the manner in which the accident occurred:

My husband and I both held the stair rail as we went descended [sic] the stairs. My husband used his walking stick ahead of him to feel for the next step. When I thought that I had reached the bottom of the stairway, I stepped forward and fell face-down on

1. On 19 January 2006, Defendant Days Inn Worldwide, Inc. and plaintiff entered into a stipulation of voluntary dismissal without prejudice as to defendant Days Inn Worldwide, Inc. only. Therefore, defendant Days Inn Worldwide, Inc. is not a party to this appeal.

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the concrete because I was actually on the last step and not on the ground floor.

In her deposition plaintiff admitted that she “realized that the stairway had no lights” and she knew there was a possibility she could fall but “there was no other way out as far as [she] knew.” Plaintiff also alleged that defendant was aware of the lack of lighting in the stairwell and failed to take reasonable action either to correct the condition or to warn users of the stairs of the condition.

Defendant answered plaintiff’s complaint, admitting defendant’s ownership of the motel premises and that plaintiff and her husband were guests, but denying the remaining allegations. Defendant also raised contributory negligence as an affirmative defense, alleging that plaintiff was negligent as she failed to exercise reasonable care in descending the stairs, failed to use a reasonable alternative route which was available to her, and that she knowingly exposed herself to an open and obvious danger.

On 8 June 2006, defendant moved for summary judgment on the basis that there was no genuine issue as to any material fact and that defendant was entitled to judgment as a matter of law. On 27 June 2006, the trial court denied defendant’s motion for summary judgment as to the issue of “actionable negligence of the defendants”, but granted the motion as to “plaintiff’s contributory negligence.” Plaintiff appealed from the trial court’s order granting the motion for summary judgment based upon contributory negligence, and defendant cross-appealed the trial court’s denial of its motion for summary judgment as to defendant’s negligence.

II. Interlocutory Appeal

[1] Although the parties have not raised this issue, “whether an appeal is interlocutory presents a jurisdictional issue, [and] this Court has an obligation to address the issue *sua sponte*.” *Akers v. City of Mt. Airy*, 175 N.C. App. 777, 778, 625 S.E.2d 145, 146 (2006). An interlocutory order is generally not immediately appealable. *Sharpe v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 578 (1999), *disc. rev. denied*, 352 N.C. 150, 544 S.E.2d 228 (2000).

A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.

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Veazey v. Durham, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381, *re-hearing denied*, 232 N.C. 744, 59 S.E.2d 429 (1950) (internal citations omitted).

A. Failure to Dispose of All of the Parties

[2] The judgment granting summary judgment did not dispose of the case as to all parties, as plaintiff entered into a stipulation of dismissal without prejudice as to defendant Days Inn. This Court has recognized that a voluntary dismissal without prejudice as to one defendant may render an order of summary judgment as to other defendants interlocutory. *Hill v. West*, 177 N.C. App. 132, 627 S.E.2d 662 (2006). However, this case may be distinguished from *Hill v. West*. *See id.*

Hill was the second appeal to this court, after the first appeal had been dismissed as interlocutory because there was one defendant remaining in the case while orders of dismissal or summary judgment had been entered in favor of the other defendants. *Id.* at 133-34, 627 S.E.2d at 663. After this Court dismissed the appeal, the parties entered into a consent order, dismissing the remaining defendant, Teresa West, (“West”) from the case, without prejudice. *Id.* The consent order specifically provided “that if this case is remanded for trial, all claims against [West] *may be reinstated as the Plaintiffs deem necessary and that the prior dismissals without prejudice will not be pled as a bar to said claims.*” *Id.* at 135, 627 S.E.2d at 664 (emphasis added).

The *Hill* plaintiffs then filed notice of appeal again, both from the order of summary judgment and dismissal which they had previously appealed and from the consent order which dismissed West without prejudice. *Id.* at 134, 627 S.E.2d at 663. The *Hill* court stated that based upon the entry of the consent order for voluntary dismissal, they believed that “counsel [were] manipulating the Rules of Civil Procedure in an attempt to appeal the 2003 summary judgment that otherwise would not be appealable.” *Id.* at 135, 627 S.E.2d at 664. We also note that as of 4 April 2006, the date of filing of *Hill*, plaintiffs would still have been able to renew the claim against West, as the time for plaintiffs to refile under North Carolina Rule of Civil Procedure 41(a)(2) had not yet expired.² *See id.* 177 N.C. App. 132,

2. Rule 41(a)(2) provides, in pertinent part, that “[i]f an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless the judge shall specify in his order a shorter time.” N.C. Gen. Stat. § 1A-1, Rule 41(a)(2).

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627 S.E.2d 662; *see also* N.C. Gen. Stat. § 1A-1, Rule 41(a)(2) (2005). The language of the consent order could arguably have even permitted plaintiffs to reinstate their claims against West after a year had expired, beyond the time permitted by Rule 41. *See Hill* at 135, 627 S.E.2d at 664; *see also* N.C. Gen. Stat. § 1A-1, Rule 41(a)(2).

In the present case, the stipulation of voluntary dismissal as to defendant Days Inn was filed on 19 January 2006. Time has expired for plaintiff to refile this claim against defendant Days Inn pursuant to North Carolina Rule of Civil Procedure 41(a)(1). *See* N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2005). The stipulation of dismissal did not contain any additional language purporting to give plaintiff any time beyond that permitted by Rule 41(a)(1) to pursue her claim against Days Inn. The procedural posture of this case does not cause us to believe that counsel are “manipulating the Rules of Civil Procedure in an attempt to appeal” an order that should not be appealable. *Hill* at 135, 627 S.E.2d at 664. We therefore conclude that *Hill* is inapposite and does not compel us to dismiss this appeal as interlocutory. *Hill* 177 N.C. App. 132, 627 S.E.2d 662.

B. Summary Judgment as to Contributory Negligence

[3] “A grant of partial summary judgment, because it does not completely dispose of the case, is an interlocutory order from which there is ordinarily no right of appeal.” *Liggett Group v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993). However, “[a] finding of contributory negligence is a bar to recovery from a defendant for acts of ordinary negligence.” *Bosley v. Alexander*, 114 N.C. App. 470, 472, 442 S.E.2d 82, 83-84 (1994).

Here, the trial court granted defendant’s summary judgment motion as to contributory negligence and denied it as to actionable negligence. Normally, a partial summary judgment grant is interlocutory, but here, a granting as to contributory negligence completely disposes of the case. *Liggett Group, Inc.* at 23, 437 S.E.2d at 677. Finding that plaintiff was contributorily negligent created “a bar to recovery . . . for acts of ordinary negligence.” *Bosley*, 114 N.C. App. at 472, 442 S.E.2d at 83. Thus, we find that this partial grant for summary judgment is not interlocutory as it “disposes of the cause . . . leaving nothing to be judicially determined between [the parties] in the trial court.” *Veazey*, 231 N.C. at 361-62, 57 S.E.2d at 381. We have concluded that this appeal is not interlocutory, and thus we will address the merits of the appeal.

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III. Granting of Summary Judgment as to
Contributory Negligence

[4] Appellant argues that the trial court committed reversible error by allowing summary judgment as to plaintiff's contributory negligence. We must view the evidence presented by the parties in the light most favorable to the plaintiff. *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). However, summary judgment is "rarely appropriate" in cases of negligence or contributory negligence. *Ballenger*, 38 N.C. App. 50, 55, 247 S.E.2d 287, 291 (1978).

In a case dealing with a plaintiff's injury from slipping and falling "[t]he basic issue with respect to contributory negligence is whether the evidence shows that, as a matter of law, plaintiff failed to keep a proper lookout for her own safety." *Rone v. Byrd Food Stores, Inc.*, 109 N.C. App. 666, 670, 428 S.E.2d 284, 286 (1993). Summary judgment is proper only if

the evidence establishes plaintiff's contributory negligence as a matter of law, [when] the evidence taken in the light most favorable to plaintiff establishes her negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom. Contradictions or discrepancies in the evidence even when arising from plaintiff's evidence must be resolved by the jury rather than the trial judge.

Rone at 670-71, 428 S.E.2d at 286-87.

In addition, "[t]he existence of contributory negligence does not depend on plaintiff's *subjective* appreciation of danger; rather, contributory negligence consists of conduct which fails to conform to an *objective* standard of behavior—the care an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury." *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 670, 268 S.E.2d 504, 507 (1980) (internal quotations omitted) (emphasis in original).

This situation is very similar to the facts in *Rappaport v. Days Inn*, in which the plaintiff fell in a dark parking lot when attempting to go from a car to her assigned motel room. 296 N.C. 382, 385, 250

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S.E.2d 245, 248 (1979), *overruled in part*, *Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998).³ The *Rappaport* court stated that

[u]nder the evidence in this case the mere fact that plaintiff attempted to go to her room in the darkness does not constitute contributory negligence as a matter of law. Reasonable men may differ as to whether plaintiff was negligent at all in attempting, despite the darkness, to reach the room to which she had been assigned. What would any reasonably prudent person have done under the same or similar circumstances? Only a jury may answer that question because the evidence, taken in the light most favorable to plaintiff, fails to establish plaintiff's negligence so clearly that no other reasonable inference may be drawn therefrom.

Rappaport at 387-88 250 S.E.2d at 249.

Defendant contends that plaintiff was fully aware that the stairwell was so dark that she could not see the steps, so that she was contributorily negligent by using the stairwell under these conditions and by her failure to seek another way out of the motel. It is certainly possible that a jury may agree with defendant. However, considering the evidence in the light most favorable to plaintiff, as we must for the non-moving party, *Bruce-Terminix Co.*, 130 N.C. App. at 733, 504 S.E.2d at 577, a jury could also find that plaintiff acted reasonably in using the stairwell since she was not aware of another way out and because she used proper care in descending the dark stairs, carefully and slowly, holding the railing, and having her husband ahead of her feeling for the steps, but fell nonetheless. We therefore reverse the trial court's order granting summary judgment in favor of defendant OMH on the issue of contributory negligence.

IV. Denial of Summary Judgment as to Negligence

[5] Generally, an appeal for dismissal of a motion for summary judgment is interlocutory. *Hallman v. Charlotte-Mecklenburg Bd. of Educ.*, 124 N.C. App. 435, 437, 477 S.E.2d 179, 180 (1996).

Ordinarily, the denial of a motion for summary judgment does not affect a substantial right so that an appeal may be taken To allow an appeal from a denial of a motion for summary judgment

3. Although the distinctions as to the status of the plaintiff under the former "premises-liability trichotomy—that is, the invitee, licensee, and trespasser classifications" were abrogated by *Nelson*, the issue for which *Rappaport* is cited here—contributory negligence as a jury question—is still good law. *Nelson*, 349 N.C. at 616-31, 507 S.E.2d at 883-92; *see also Rappaport*, 296 N.C. 382, 250 S.E.2d 245.

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would open the flood gate of fragmentary appeals and cause a delay in administering justice.

Shoffner Indus., Inc. v. W. B. Lloyd Const. Co., 42 N.C. App. 259, 272, 257 S.E.2d 50, 59, *disc. rev. denied*, 298 N.C. 296, 259 S.E.2d 301 (1979). Here, just as in *Shoffner Indus., Inc.*, we have a cross-appeal on a motion for summary judgment. *See id.* We agree with *Shoffner Indus., Inc.*, and hold that

[D]efendant's . . . cross appeal could be dismissed for [being interlocutory]. However, to avoid any confusion about the posture of the case . . . we have reviewed the pleadings and supporting [documents] in support of and in opposition to the motion for summary judgment. Suffice it to say that they obviously give rise to genuine issues of material fact and granting of summary judgment would be patently erroneous. For the limited reasons stated, we affirm the trial court's [decision on] the motion for summary judgment.

Id. at 272-73, 257 S.E.2d at 59.

V. Conclusion

For the reasons stated above, we reverse the trial court's order granting summary judgment in favor of defendant OMH as to plaintiff's contributory negligence and we affirm the trial court's order denying summary judgment as to defendant's negligence.

AFFIRMED IN PART and REVERSED IN PART.

Judges McCULLOUGH and BRYANT concur.

STATE OF NORTH CAROLINA v. KEVIN NICHOLAS BROWER

No. COA06-1615

(Filed 16 October 2007)

**1. Constitutional Law— effective assistance of counsel—
court's ex mero motu excusal of juror**

Defendant was not denied his right to the effective assistance of counsel in a murder trial when the trial judge questioned a potential juror and removed him for cause ex mero motu when

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the juror indicated that he would be unable to give both sides a fair trial if the murder arose out of a drug deal. The issue is whether the trial court properly excused a juror for cause, not whether defendant's Sixth Amendment rights were violated; defendant's reasoning followed to its conclusion would implicate defendant's Sixth Amendment counsel rights any time the court removed a juror for cause *ex mero motu*. Here, the basis for the potential juror's removal was readily apparent and well within the trial court's discretion.

2. Jury— selection—death qualification—*Batson* challenge

The trial court did not err by denying defendant's *Batson* challenge to the State's peremptory challenge of a juror. Defendant's argument is a thinly veiled attack upon death qualifying the jury, but the law is clear that death qualification does not violate a defendant's rights under the federal or state constitutions.

**3. Homicide— first-degree murder—sufficiency of evidence—
motion for appropriate relief**

The trial court did not err in a murder trial by denying defendant's post-trial motion for appropriate relief, in which he argued that there was insufficient evidence that defendant murdered one of the victims. The State presented substantial evidence that defendant was guilty of this murder.

Appeal by defendant from judgment entered 1 December 2005 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 23 August 2007.

Attorney General Roy Cooper, by Special Deputy Attorney General A. Danielle Marquis, for the State.

The Law Office of Bruce T. Cunningham, Jr., by Bruce T. Cunningham, Jr. and Amanda S. Zimmer, for defendant-appellant.

STEELMAN, Judge.

When a prospective juror expresses doubts about his ability to give both sides a fair trial, the court does not violate a defendant's Sixth Amendment right to counsel by excusing the juror for cause. A defendant may not use the *Batson* process to obviate the death qualification of a jury in a capital case. There was substantial

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evidence presented on each element of murder, and defendant's motion for appropriate relief on the basis of insufficient evidence was properly denied.

I. Factual Background

On 3 June 2002, Kevin Brower ("defendant") contacted Juan Romero ("Romero") to arrange a drug deal on behalf of his co-defendant William Little ("Little"). Romero informed defendant that Jose Zapatero ("Zapatero") would provide a kilogram of cocaine in exchange for twenty-three thousand dollars. Defendant and Little met Romero at Romero's house on 23 June 2002 and then followed Romero to Zapatero's house to make the exchange. Upon their arrival at Zapatero's house, the men learned that the cocaine had not yet been delivered. Emedel Hernandez ("Hernandez") and Elmer Carbajal ("Carbajal") arrived twenty minutes later with the cocaine, and stated that it was about four ounces short of a kilogram. At that point, Romero turned to exit the trailer and was shot once in the neck by Little. Defendant drew his weapon and began shooting. He stated that he did not remember exactly whom he shot but admitted to shooting Hernandez twice. Romero testified that he saw defendant shooting at Zapatero and Hernandez, and that he saw Little shooting at Carbajal. Zapatero, Hernandez, and Carbajal were all killed during the shooting, and Romero suffered a non-fatal wound to the neck. There was no indication that any of the victims were armed.

Defendant was indicted on 21 October 2002 for the murders of Hernandez, Carbajal, and Zapatero, and for assault with a deadly weapon with intent to kill inflicting serious injury on Romero. Defendant was tried capitally and was convicted of the lesser included offense of second degree murder of both Hernandez and Carbajal. Defendant was found not guilty of the murder of Zapatero and not guilty of assault on Romero. Defendant was sentenced to two consecutive terms of 220 to 273 months imprisonment. Defendant appeals. Defendant also appeals from the denial of his post-trial motion for appropriate relief filed pursuant to N.C. Gen. Stat. § 15A-1414 (2005).

II. Denial of Effective Assistance of Counsel

[1] In his first argument, defendant contends he was denied his Sixth Amendment right to effective assistance of counsel when the trial court *ex mero motu* excused prospective juror Lochrie for cause. We disagree.

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The trial judge questioned potential juror Lochrie regarding his ability to give both sides a fair trial given the fact that the alleged events occurred during the course of a drug deal. The trial court asked Lochrie if his feelings about “this particular topic” would cause him to be partial towards one side or the other, and Lochrie answered unequivocally “yes.” After ascertaining that Lochrie’s ability to evaluate the evidence presented would be affected by the circumstances under which the events occurred, the court ruled that he would be unable to give both parties a fair trial and removed him for cause.

Although defendant frames his argument as a constitutional issue, citing *United States v. Cronin*, the circumstances do not support a *Cronin* analysis. A defendant is deprived of counsel under *Cronin* when the facts show that counsel completely failed to function in any meaningful sense as an adversary to the prosecution or was prevented from assisting the defendant during a critical stage of the prosecution. *United States v. Cronin*, 466 U.S. 648, 80 L. Ed. 2d 657 (1984). Cases in which a denial of counsel has been found are limited to blatant and egregious violations of Sixth Amendment rights. See *Brooks v. Tennessee*, 406 U.S. 605, 612-13, 32 L. Ed. 2d 358, 364 (1972) (finding a Sixth Amendment violation when defendant was compelled to testify before he presented his defense witness); *Geders v. United States*, 425 U.S. 80, 91, 47 L. Ed. 2d 592, 602 (1976) (holding that an order forbidding defendant from communicating with his attorney for a 17-hour overnight recess infringed upon defendant’s Sixth Amendment right to counsel).

The circumstances here differ from those in which Sixth Amendment violations have been found, and we hold that defendant was not denied effective assistance of counsel. The record reveals that before questioning Lochrie, the court specifically offered defense counsel the opportunity to question Lochrie. Defense counsel declined and did not object to the court’s questioning of Lochrie. Moreover, the trial court’s removal of Lochrie for cause was consistent with its prior decision to allow defendant’s challenge for cause to potential juror Brady. Brady was asked whether he would be influenced by the fact that the alleged murders occurred during the course of a drug deal. Brady responded affirmatively and was excused for cause upon defendant’s motion. Lochrie’s acknowledgments were sufficient to establish cause for his removal just as Brady’s responses supported his removal upon defendant’s motion.

The issue is whether the trial court properly excused a juror for cause, not whether defendant’s Sixth Amendment rights were vio-

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lated. If defendant's reasoning was followed to its logical conclusion, any time the court *ex mero motu* removed a juror for cause, defendant's Sixth Amendment counsel rights would be implicated. This is clearly not correct.

North Carolina statutes specifically provide that the court must excuse a juror, even after the juror has been accepted by both parties, "if the judge determines there is a basis for challenge for cause[.]" N.C. Gen. Stat. § 15A-1214(g) (2005). As part of its responsibility to oversee the *voir dire* of prospective jurors, "[t]he trial court has broad discretion to see that a competent, fair, and impartial jury is impaneled, and its ruling in that regard will not be reversed absent a showing of an abuse of its discretion." *State v. Anderson*, 355 N.C. 136, 140, 558 S.Ed.2d 87, 91 (2002) (quoting *State v. Conaway*, 339 N.C. 487, 508, 453 S.E.2d 824, 837-38, *cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153 (1995)). Our standard of review on appeal is abuse of discretion, and the court's decision will be upheld unless defendant can show the ruling to be "so arbitrary that it could not have been the result of a reasoned decision." *State v. Allen*, 322 N.C. 176, 189, 367 S.E.2d 626, 633 (1988) (citing *State v. Barts*, 316 N.C. 666, 682, 343 S.E.2d 828, 839 (1986)).

Lochrie's responses to the court's questions left no doubt that he would be unable to give a fair trial if the murder arose out of a drug deal. Although the Sixth Amendment jurisprudence places some boundaries on the trial court's discretionary authority, defendant's understanding of the nature and extent of that protection is misguided and unsuited to the facts of this case. The basis for Lochrie's removal was readily apparent and well within the trial court's discretion. We hold that there has been no showing of abuse of discretion by the court, and this argument is without merit.

III. Denial of Defendant's *Batson* Challenge

[2] In his second argument, defendant contends the trial court erred in denying his *Batson* challenge to the State's peremptory challenge of juror Saunders. Defendant argues this violated Saunders' rights under the First and Fourteenth Amendments to the United States Constitution. We disagree.

During the jury *voir dire*, prospective juror Saunders admitted that he would have "a bit of a struggle with the death part" during the sentencing phase of the trial. Subsequently, the State exercised a peremptory challenge to remove Saunders. Upon defendant's objec-

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tion and motion, the court conducted a *Batson* hearing outside the presence of the jury. The State enunciated a non-discriminatory reason for excusing Saunders. The court accepted the State's race-neutral explanation and denied defendant's *Batson* challenge.

The basis for defendant's objection at trial was that the State used its peremptory challenge in violation of Saunders' Fourteenth Amendment rights. Specifically, defendant alleged that the State exercised the peremptory challenge based upon Saunders' race, an action prohibited by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. See *Batson v. Kentucky*, 476 U.S. 79, 89, 90 L. Ed. 2d 69, 83 (1986). However, defendant's argument on appeal is a violation of Saunders' First Amendment rights to protected speech and association. Defendant is not permitted to make one constitutional argument before the trial court, and a different one on appeal. *State v. Benson*, 323 N.C. 318, 321-22, 372 S.E.2d 517, 519 (1988).

Defendant argues that:

Excluding a juror because of his views on the death penalty, is not narrowly tailored to the government's objective of ensuring the defendant a fair trial with an impartial jury, a legitimate interest. Instead, excluding a juror for his views on the death penalty can only be construed as narrowly tailored to 'stacking the deck' against the Defendant, an illegitimate interest. In light of the State's *race neutral* reason to exclude Juror Saunders, Defendant contends that excluding Juror Saunders for his views on capital punishment was in violation of the First Amendment to the United States Constitution.

This argument is a thinly veiled attack upon the practice of death-qualifying a jury in a capital murder trial. Defendant was tried capitally for the murders of Zapatero, Hernandez, and Carbajal. The law is clear that death qualification of a jury does not violate a defendant's rights under the federal or state constitutions. *State v. Williams*, 355 N.C. 501, 552, 565 S.E.2d 609, 639 (2002), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003) (citing *State v. Conner*, 335 N.C. 618, 627-28, 440 S.E.2d 826, 831-32 (1994)). This court is bound by these decisions of our state Supreme Court. *State v. Glynn*, 178 N.C. App. 689, 697, 632 S.E.2d 551, 557 (2006).

We further note that the North Carolina Supreme Court has expressly rejected the argument that *Batson* "compels further ero-

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sion of the unfettered use of peremptory challenges.” *State v. Fullwood*, 323 N.C. 371, 382, 373 S.E.2d 518, 525 (1988), *sentence vacated on other grounds*, 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990).

The appropriate standard of review for determining whether the trial court has erred in denying an objection to an opposing party’s peremptory challenge of a juror is abuse of discretion. *Conaway*, 339 N.C. at 508, 453 S.E.2d at 837-38. There has been no showing that the trial court abused its discretion in denying defendant’s *Batson* challenge to the State’s peremptory challenge as to juror Saunders on the basis of his views on the death penalty. This argument is without merit.

IV. Denial of Motion for Appropriate Relief

[3] In defendant’s third argument, he contends that the trial court erred in denying his motion for appropriate relief on the grounds that there was insufficient evidence that defendant murdered Hernandez to support a guilty verdict. We disagree.

In his post-trial motion for appropriate relief, defendant asserted that by finding defendant not guilty of the murder of Zapatero, and not finding defendant guilty of first degree murder based on premeditation and deliberation or felony murder in the murders of Hernandez and Carbajal, the jury necessarily rejected the State’s theory that defendant acted in concert with Little. He further asserted that absent an acting in concert theory, there was insufficient evidence to submit to the jury the defendant’s guilt of the murder of Hernandez. This motion was denied by the trial court on 14 December 2005.

The jury found defendant guilty of second degree murder of Hernandez. The essential elements of second degree murder are an unlawful killing with malice, but without premeditation or deliberation. N.C. Gen. Stat. § 14-17 (2005); *State v. Rich*, 351 N.C. 386, 395, 527 S.E.2d 299, 304 (2000) (citation omitted). When reviewing a trial court’s ruling on a motion for appropriate relief, the “findings are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion. However, the trial court’s conclusions are fully reviewable on appeal.” *State v. Lutz*, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006) (quoting *State v. Wilkins*, 131 N.C. App. 220, 223, 506 S.E.2d 274, 276 (1998) (internal citations omitted)).

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The evidence at trial showed that both defendant and Little fired their guns inside the trailer. In ruling on defendant's motion for appropriate relief, the court found as fact:

That thereafter Mr. Brower pulled a .45-caliber firearm from his person and fired several shots at the direction of Emedel Rosas Hernandez, Elmer Adan Carbajal, Jose Luis Zapatero.

...

That the area in the trailer where all the shooting occurred was a very small, confined area of approximately twelve to fifteen feet occupied at the time of the incident by six individuals.

The court's findings of fact were supported by competent evidence. In defendant's statement to Detective Beard, he admitted that "William Little had a .45-caliber and I had a .45-caliber." Defendant also admitted shooting the "guy with no shirt on twice." The victim without a shirt was Hernandez, and evidence was presented that Hernandez was one of the two victims who was shot multiple times.

The State presented substantial evidence that defendant was guilty of murder of Hernandez. The trial court did not err in denying defendant's motion for appropriate relief pursuant to N.C. Gen. Stat. § 15A-1414. This argument is without merit.

Defendant makes nine assignments of error but only brings forward three of them in his brief. The remaining assignments of error are deemed abandoned. *See* N.C.R. App. P. 28(b)(6) (2007).

NO ERROR as to the trial.

AFFIRMED as to the denial of defendant's motion for appropriate relief.

Judges ELMORE and STROUD concur.

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STATE OF NORTH CAROLINA v. MARY ROSEMAN JONES

No. COA06-1495

(Filed 16 October 2007)

1. Search and Seizure— probable cause—reasonable suspicion—driving while impaired

The trial court did not err in a habitual driving while impaired case by denying defendant's motion to suppress even though defendant contends an officer did not have probable cause to stop her, because: (1) it is unnecessary to determine whether he had probable cause for a registration violation when the totality of circumstances revealed the officer had reasonable suspicion to stop defendant for DWI; and (2) contrary to defendant's assertion, the DWI statute has no requirement that a vehicle must be interfering with traffic in order for an officer to constitutionally stop a vehicle.

2. Motor Vehicles— habitual driving while impaired—sufficiency of findings of fact

The trial court did not err in a habitual driving while impaired case by allegedly making insufficient findings of fact that defendant committed any traffic violations, because: (1) the order in open court and the written order signed by the court found such violations; and (2) the trial court specifically found that the officer initiated a traffic stop on his suspicion that defendant could have violated North Carolina law including driving while under the influence and for a registration plate law violation.

3. Evidence— questioning by trial court—promoting understanding of case—impartiality—no expression of opinion

The trial court did not err in a habitual driving while impaired case by asking an officer an additional question about defendant's behavior after the traffic stop, because: (1) the trial court stated it was trying to understand the whole picture of what happened, and although it was outside the scope of what was appropriate for such a hearing, defendant made no legitimate argument that the judge was partial to the State's case; (2) when the trial court questions a witness to clarify his testimony or to promote an understanding of the case, such questioning does not amount to an expression of the trial court's opinion as to defendant's guilt or innocence; (3) the trial court is presumed to disregard incompe-

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tent evidence in making its decisions as a finder of fact, and there was no showing by defendant to overcome this presumption; and (4) none of the trial court's findings of fact related to any testimony received after the officer was asked to step down.

4. Appeal and Error— preservation of issues—failure to object—failure to administer oath to witness

The trial court did not commit prejudicial error in a habitual driving while impaired case by questioning an officer after the close of the evidence without again informing the officer that he was still under oath, because: (1) where a trial court fails to administer the oath to a witness, defendant's failure to object waives appellate review of the court's error since upon objection the trial court could have corrected any error; and (2) defense counsel neither objected nor attempted to question the officer at any time before, during, or after the trial court's questions.

Appeal by defendant from judgment entered 25 April 2006 by Judge Michael E. Beale in Cabarrus County Superior Court. Heard in the Court of Appeals 21 August 2007.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Christopher W. Brooks, for the State.

The Law Office of Yolanda M. Trotman, PLLC, by Yolanda M. Trotman, for defendant-appellant.

HUNTER, Judge.

Mary Roseman Jones ("defendant") pled guilty to habitual driving while impaired, conditioned on her right to appeal the trial court's denial of a motion to suppress. Defendant was sentenced to a minimum of twelve (12) months and a maximum of fifteen (15) months. Defendant now appeals the denial of her motion to suppress. After careful consideration, we affirm.

On 10 September 2005, defendant was traveling east on a two-wheeled motorized vehicle¹ in Kannapolis. Officer M.D. Barnhardt ("Officer Barnhardt") of the Kannapolis Police Department was in his squad car and saw defendant make an "unsteady" turn onto Cannon

1. Defendant asserts that the vehicle was a moped or noped, while the State argues that defendant's vehicle, under the North Carolina General Statutes, met the definition of a motorcycle. See N.C. Gen. Stat. § 105-164.3(22) (2005) (defining moped); N.C. Gen. Stat. § 20-4.01(27)d (2005) (defining motorcycle).

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Boulevard and “put her foot down” as she made the right-hand turn. Officer Barnhardt described defendant’s operation of the vehicle as “wobbly” and equated her driving to that of a child learning to ride a bicycle without training wheels for the first time.

Officer Barnhardt followed defendant down Cannon Boulevard, a forty-five (45) mile per hour zone. At this time, Officer Barnhardt formed the opinion that defendant’s vehicle was traveling in excess of thirty (30) miles per hour. As defendant was traveling up a slight incline, Officer Barnhardt used his radar and clocked the vehicle at a speed of thirty-two (32) miles per hour. According to Officer Barnhardt, defendant’s motorized vehicle was traveling at such a rate of speed that it met the definition of a motorcycle, and he pulled the vehicle over for not having a registration plate. He also concluded that defendant may have been operating this vehicle while impaired. As a result of the traffic stop, defendant was charged with driving while impaired (“DWI”). Defendant was not charged with the registration plate violation or any other traffic violations.

At the hearing on defendant’s motion to suppress, Officer Barnhardt testified to the facts as set out above. Defendant called one witness, Steven Halprin (“Halprin”), an owner of Accel Motor Sports. Halprin testified that defendant was operating a “noped,” which means there are two floorboards where the feet are to remain while in operation and that the vehicle does not have pedals. Halprin testified that nopedes are “anemic,” “accelerate very slowly[,]” are “difficult to handle[,]” and are hard to maneuver with smaller tires. Halprin, however, had no personal knowledge as to the events of that day.

Defendant presents the following issues for this Court’s review: (1) whether the trial court erred in denying defendant’s motion to suppress; (2) whether the trial court’s order presented sufficient findings of fact to support its denial of defendant’s motion to suppress; and (3) whether the trial court erred in eliciting testimony from a witness. We address each issue in turn.

I.

[1] In reviewing a ruling on a motion to suppress, the trial court’s findings of fact “are conclusive and binding on the appellate courts when supported by competent evidence.” *State v. Brooks*, 337 N.C. 132, 140-41, 446 S.E.2d 579, 585 (1994). The conclusions of law, however, “are binding upon us on appeal [only] if they are supported by

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the trial court's findings." *Id.* at 141, 446 S.E.2d at 585. Defendant argues that the trial court erred in denying defendant's motion to suppress because Officer Barnhardt did not have probable cause to stop defendant. We disagree.

Before turning to the merits of the case, it is necessary to discuss what level of suspicion is required under the Fourth Amendment of the United States Constitution and under Article 1, Section 20 of the North Carolina Constitution to make a traffic stop. Defendant relies on *State v. Ivey*, 360 N.C. 562, 633 S.E.2d 459 (2006), for the proposition that probable cause is required for all traffic stops. In that case, our Supreme Court held that "the United States and North Carolina Constitutions require an officer who makes a [stop] on the basis of a perceived traffic violation to have probable cause to believe the driver's actions violated a motor vehicle law." *Id.* at 564, 633 S.E.2d at 461; see *Whren v. United States*, 517 U.S. 806, 810, 135 L. Ed. 2d 89, 95 (1996) (noting that "the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred"). The State argues that this statement is *dicta* and that the standard for a traffic stop need only amount to reasonable suspicion. See, e.g., *State v. Foreman*, 351 N.C. 627, 630, 527 S.E.2d 921, 923 (2000) (applying reasonable suspicion analysis in the context of an investigatory stop); *State v. Aubin*, 100 N.C. App. 628, 631-32, 397 S.E.2d 653, 655 (1990) ("[a]n officer's stop of a car to investigate a potential traffic offense does not require probable cause, but it is governed by the reasonableness standards of the Fourth Amendment").

Generally, reasonable suspicion is required to stop a motorist on suspicion of DWI, while probable cause is required to stop a motorist for a simple traffic violation, such as failure to use a turn signal or speeding. See *State v. Styles*, 185 N.C. App. 271, 274, 648 S.E.2d 214, 216 (2007). The reason for the distinction is that in cases such as drunk driving or driving without a license, the officer must make an investigatory stop to determine whether criminal activity is afoot. *Id.* Accordingly, the Constitution only requires the officer to have reasonable suspicion before making the investigatory stop. *Aubin*, 100 N.C. App. at 631-32, 397 S.E.2d at 655. Such was not the case in *Ivey*. In that case, the Court applied the probable cause standard because it was reviewing a stop based on an alleged traffic violation—failure to use a turn signal—not a stop that would require further investigation. Thus, in this case, the officer's conduct will be constitutional if he had either: (1) reasonable suspicion to stop

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defendant on suspicion of DWI; or (2) probable cause to stop defendant for failure to register the vehicle. Because we find that Officer Barnhardt had reasonable suspicion to stop defendant for DWI, we need not determine whether he had probable cause to stop defendant for a registration violation.

At the outset, we note that the trial court's findings of fact are supported by competent evidence. The evidence in support of those findings of fact consists of Officer Barnhardt's testimony before the trial court as set out above. Accordingly, those findings of fact are binding on this Court. *See Brooks*, 337 N.C. at 140-41, 446 S.E.2d at 585. Thus, the issue is whether those findings of fact support the trial court's conclusion that Officer Barnhardt had reasonable suspicion to stop defendant on the DWI charge. *See id.* at 141, 446 S.E.2d at 585.

“ ‘A police officer may conduct a brief investigative stop of a vehicle where justified by specific, articulable facts which give rise to a reasonable suspicion of illegal conduct.’ ” *Aubin*, 100 N.C. App. at 632, 397 S.E.2d at 655 (citation omitted). In this case, Officer Barnhardt observed a motorized vehicle driven by defendant operating in a “wobbly” manner and that defendant had to “put her foot down” on the road in order to negotiate a right hand turn and “almost dropped the moped.” He equated her operation of the vehicle as she was turning to that of “a child learning to ride a bicycle[.]” for the first time. Officer Barnhardt testified that these initial observations occurred within approximately ten (10) seconds. After defendant made the turn, Officer Barnhardt observed defendant for “[t]wo to three” minutes and followed her for “two to three blocks[.]” During this time, he watched defendant wobble on the moped and described her operation of it as “jerky.”

We thus conclude that, under the totality of the circumstances, reasonable suspicion existed that defendant was driving while impaired. *See id.* (finding reasonable suspicion of DWI when defendant was weaving within his own lane and traveling below the speed limit); *State v. Jones*, 96 N.C. App. 389, 395, 386 S.E.2d 217, 221 (1989) (same). Accordingly, we need not address whether there was probable cause to stop defendant for failure to register her vehicle.

Defendant relies heavily on *Ivey* for the proposition that, in order for an officer to constitutionally stop a vehicle, the vehicle must be interfering with traffic. Defendant mischaracterizes that Court's holding. The reason the lack of interference with surrounding traffic was relevant in *Ivey* was because that was a requirement of the statute at

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issue in that case. *Ivey*, 360 N.C. at 565, 633 S.E.2d at 461 (citation omitted) (“[t]he duty to give a statutory signal of an intended . . . turn does not arise in any event unless the operation of some “other vehicle may be affected by such movement” ’ ”). In the instant case, the DWI statute has no such requirement. Thus, we do not find *Ivey* persuasive on this issue. Because defendant’s Fourth Amendment rights under the United States Constitution and under Article 1, Section 20 of the North Carolina Constitution were not violated, her assignments of error as to this issue are rejected.

II.

[2] Defendant argues that the trial court did not make sufficient findings of fact. We disagree.

In essence, defendant argues that the trial court’s factual findings were insufficient because the court did not make any findings “that the defendant committed any traffic violations.” As seen in the order entered in open court and the written order signed by the trial court, the court clearly found such violations. Specifically, the trial court found that: “13. Based on the foregoing, Officer Barnhardt initiated a traffic stop on his suspicion that the Defendant could have violated North Carolina law *including driving while under the influence and for a registration plate law violation.*” (Emphasis added.) Thus, defendant’s assignment of error as to this issue is rejected.

III.

Defendant makes two arguments in this section. First, that the trial court erred in hearing testimony regarding defendant’s behavior after the traffic stop, and second, that the trial court committed prejudicial error in questioning Officer Barnhardt after the close of the evidence. We disagree and address each argument in turn.

A.

[3] At the conclusion of re-cross examination by defendant’s counsel, Officer Barnhardt was told to step down and the State was told to call its next witness. Before Officer Barnhardt stepped down the trial judge asked him, “[a]fter you stopped her[,] what did you do next?” Officer Barnhardt responded, “[m]y field sobriety tests. Well, I approached her and asked for her license and she didn’t have any.” At this point, defense counsel objected and pointed out to the trial court that the purpose of the hearing was limited to the narrow issue of whether the stop was constitutional and not whether the defendant was in fact under the influence at the time of the stop.

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Because of this additional questioning, defendant argues that the trial judge violated defendant's constitutional right to a "trial[] by an impartial jury of the state[.]" U.S. Const. amend. VI. We fail to see how these questions demonstrate that the trial judge was partial to the State's case. As the trial judge stated, he was trying to understand "the whole picture on what happened[.]" Although "the whole picture on what happened" that night was outside the scope of what was appropriate for such a hearing, defendant has made no legitimate argument that the judge was partial to the State's case.

In fact, "[w]hen the trial judge questions a witness to clarify his testimony or to promote an understanding of the case, such questioning does not amount to an expression of the trial judge's opinion as to defendant's guilt or innocence." *State v. Davis*, 294 N.C. 397, 402, 241 S.E.2d 656, 659 (1978). Furthermore, the trial court is presumed to disregard incompetent evidence in making its decisions as a finder of fact. *State v. Allen*, 322 N.C. 176, 185, 367 S.E.2d 626, 631 (1988). There has been no showing by defendant to overcome this presumption. None of the trial court's findings of fact were related to any testimony received after Officer Barnhardt was asked to step down. Accordingly, we find no prejudicial error, and defendant's assignment of error as to this issue is overruled.

B.

[4] Defendant also argues that the trial court erred in questioning Officer Barnhardt after the close of the evidence without again informing the officer that he was still under oath.

At the conclusion of the evidence by the State and defendant, the trial court stood in recess while the trial judge left the bench to render his decision. The trial judge returned and asked Officer Barnhardt, who was sitting next to the assistant district attorney and not on the witness stand, "what was your suspicion for stopping the defendant on this date? What were you suspicious of her doing?" Officer Barnhardt responded that "[a]fter her wobbling and the clocking of the moped it was a DWI." The trial court also asked "[d]id the registration plate have any reason why you stopped her?" Officer Barnhardt responded that it did.

"[W]here the trial court fails to administer the oath to a witness, the defendant's failure to object waives appellate review of the court's error." *State v. Beane*, 146 N.C. App. 220, 225, 552 S.E.2d 193, 196 (2001). The rationale for this rule is that upon objection the trial court

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could have corrected any error. *Id.* Defense counsel neither objected nor attempted to question Officer Barnhardt at any time before, during, or after the trial court's questions. Accordingly, defendant has waived review of this error.

IV.

In summary, we hold that neither defendant's Fourth Amendment rights under the United States Constitution nor defendant's rights under Article I, Section 20 of the North Carolina Constitution were violated. We find no error in the trial court's findings of fact and no prejudicial error in the trial court eliciting testimony from the officer.

Affirmed.

Judges WYNN and BRYANT concur.

KENNETH WAYNE WEAVER, AND ANN WEAVER, PLAINTIFFS v. CHARLES MICHAEL SHEPPA, M.D., LESLIE PATRICIA MARSHALL, M.D., AND RALEIGH EMERGENCY MEDICINE ASSOCIATES, INC., DEFENDANTS

No. COA07-52

(Filed 16 October 2007)

**Medical Malpractice— proximate cause—expert testimony—
specialities of witnesses**

In a medical malpractice action, expert testimony on causation (rather than the standard of care) is competent as long as it is helpful to the jury and is based on information reasonably relied upon. The trial court here erred by granting a judgment NOV for defendants in an action arising from a back injury where defendants contended that plaintiffs' evidence of proximate causation did not come from appropriate experts.

Appeal by plaintiff from judgment entered 24 July 2006 by Judge A. Leon Stanback, Jr. in Wake County Superior Court. Heard in the Court of Appeals 29 August 2007.

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Knott, Clark & Berger, L.L.P., by Joe Thomas Knott, III, Michael W. Clark and Kenneth R. Murphy, III, for plaintiffs-appellants.

Young Moore & Henderson, P.A., by William P. Daniell; and Ellis & Winters, LLP, by Leslie C. O'Toole, for defendants-appellees.

SMITH, Judge.

Kenneth and Ann Weaver (hereinafter Mr. Weaver and Mrs. Weaver respectively and collectively plaintiffs) appeal entry of judgment notwithstanding the verdict (herein JNOV) pursuant to N.C. Gen. Stat. § 1A-1, Rule 50(b) in favor of defendants. We reverse.

The pertinent facts may be summarized as follows: At approximately 5:00 a.m. on 29 September 2000, Mr. Weaver was unable to stand after sitting down in the bathroom of his home. The symptoms were worse on the left side of his body than the right, and he “felt numb all over.” Upon Mr. Weaver’s arrival by ambulance at Rex Hospital’s Emergency Department (Emergency Department), he informed nursing personnel of neck pain and symptoms in his back and arms.

Soon thereafter, defendant, Dr. Charles Sheppa, examined Mr. Weaver. Defendant Dr. Sheppa informed plaintiff’s wife Mrs. Weaver that he had not suffered a heart attack, but surmised that he had some kind of a problem with a disk in his neck. Dr. Sheppa then informed Mrs. Weaver that a MRI could be performed on Mr. Weaver’s neck, which would enable diagnosis of such problem as might exist with a disk. However, Dr. Sheppa did not order a MRI of Mr. Weaver’s neck. Instead, Dr. Sheppa ordered lab work and radiographic studies including a cervical spine film, prescribed pain medication and fitted Mr. Weaver with a soft cervical collar. After Dr. Sheppa discharged Mr. Weaver from the Emergency Department, he still had difficulty walking and continued to experience numbness in both arms and legs.

The following morning of 30 September 2000, Mr. Weaver informed Mrs. Weaver that he was getting weaker and was unable to walk unassisted. Consequently, Mrs. Weaver took Mr. Weaver back to the Rex Hospital Emergency Department, where he came under the care of defendant Dr. Leslie Marshall (Dr. Marshall). Mr. Weaver reported his continuing pain and numbness to Dr. Marshall. Upon returning from Radiology after a CT scan, Mr. Weaver continued to experience complete numbness of his entire left side and progressive

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numbness with tingling and burning of his entire right side. After completing a physical examination, Dr. Marshall told Mrs. Weaver that Mr. Weaver was being discharged and he needed to follow up with his regular physician on Monday. However, while being assisted to the bathroom in a wheelchair, Mr. Weaver fell out of the wheelchair and proceeded to urinate on himself.

At this juncture, Mr. Weaver was admitted to Rex Hospital but did not receive a MRI until the following day, 1 October 2000. The MRI revealed a large central herniated disk accompanied by significant compression of Mr. Weaver's cervical spinal cord. Findings of the MRI were discussed with the on-call neurologists, Dr. Perkins. Dr. Michael Bowman (a neurologist) and Dr. Robert Allen (a neurosurgeon) subsequently informed Mrs. Weaver that emergency surgery had to be performed immediately.

Dr. Allen performed an anterior cervical discectomy and decompression of Mr. Weaver's spinal cord. Mr. Weaver required hospitalization and rehabilitation for approximately two months. Mr. Weaver regained some use of his arms and legs; however, he needed to re-learn certain everyday functions such as dressing himself, brushing his teeth, and feeding himself using a special spoon. Mr. Weaver also required a standing frame and, eventually, pool therapy in order to learn how to walk again. Over time, Mr. Weaver achieved limited mobility through use of a walker, three-pronged walker, cane and scooter.

On 2 July 2003, plaintiffs' (Mr. and Mrs. Weaver) filed the instant action, alleging *inter alia*, negligence. The action was heard by a jury on 3 April 2006, before Judge A. Leon Stanback, Jr. At trial, plaintiffs offered a litany of expert testimony from, among others, neurologists and emergency room physicians. Defendants moved for directed verdict at the close of plaintiffs' evidence and again at the close of all evidence in accordance with N.C. Gen. Stat. § 1A-1, Rule 50 (2005). The trial court denied both motions. On 18 April 2006, the trial court declared a mistrial as the jury was unable to reach a unanimous verdict on the issues submitted to them. Defendants then moved for JNOV pursuant to N.C. Gen. Stat. § 1A-1, Rule 50(b), which provides in pertinent part:

Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if

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a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. In either case the motion shall be granted if it appears that the motion for directed verdict could properly have been granted. (emphasis added).

On 20 July 2006, the trial court granted defendants motion for JNOV. Plaintiffs filed timely notice of appeal.

In plaintiffs' sole argument on appeal, they contend the trial court erred by granting JNOV in favor of defendants because plaintiffs presented more than a scintilla of competent evidence at trial which tended to satisfy the element of proximate cause. This argument has merit.

A ruling on a motion for JNOV is a question of law for which we provide *de novo* review. *Bahl v. Talford*, 138 N.C. App. 119, 122, 530 S.E.2d 347, 350 (2000). When considering a motion for JNOV,

all the evidence must be considered in the light most favorable to the nonmoving party. The nonmovant is given the benefit of every reasonable inference . . . from the evidence and all contradictions are resolved in the nonmovant's favor. If there is more than a scintilla of evidence supporting each element of the nonmovant's case, the motion for . . . judgment notwithstanding the verdict should be denied.

Ace Chemical Corp. v. DSI Transports, Inc., 115 N.C. App. 237, 242, 446 S.E.2d 100, 103 (1994) (citations omitted).

Evidence of medical malpractice sufficient to withstand a motion for JNOV must establish each of the following essential elements: “ ‘(1) the applicable standard of care; (2) a breach of such standard of care by the defendant; (3) the injuries suffered by the plaintiff were proximately caused by such breach; and (4) the damages resulting to the plaintiff.’ ” *Purvis v. Moses H. Cone Memorial Hosp. Service Corp.*, 175 N.C. App. 474, 477, 624 S.E.2d 380, 383 (2006) (quoting *Weatherford v. Glassman*, 129 N.C. App. 618, 621, 500 S.E.2d 466, 468 (1998)). Accordingly, plaintiff must “demonstrate by the testimony of a qualified expert that the treatment administered by defendant was in negligent violation of the accepted standard of medical care in the community and that defendant's treatment proximately caused the injury.” *Ballenger v. Crowell*, 38 N.C. App. 50, 54, 247 S.E.2d 287, 291 (1978). “Proximate cause is a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced

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the plaintiff's injuries, and without which the injuries would not have occurred[.]” *Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984). Specifically, “[e]xpert medical witnesses are called to testify on issues of causation in disease or illness for the purpose of giving their expert opinions as to the reasonable scientific certainty of a causal relation or the lack thereof.” *Ballenger v. Burris Industries, Inc.*, 66 N.C. App. 556, 567, 311 S.E.2d 881, 887 (1984); *see also Tice v. Hall*, 63 N.C. App. 27, 28, 303 S.E.2d 832, 833 (1983) (“expert testimony is required to establish . . . that such negligent violation [of the requisite standard of care] was the proximate cause of the injury complained of.”). Because causation is, in essence, a factual inference to be garnered from attendant facts and circumstances, it is a question generally best answered by a jury. *Leatherwood v. Ehlinger*, 151 N.C. App. 15, 24, 564 S.E.2d 883, 889 (2002). However, expert testimony based merely on speculation and conjecture “is not sufficiently reliable to qualify as competent evidence on issues of medical causation.” *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000).

In the case *sub judice*, we initially observe that defendants concede that “plaintiffs did offer evidence that the failure [of Drs. Sheppa and Marshall] to order an MRI was a deviation from the applicable standard of care[.]” Regarding causation, defendants also concede that plaintiffs “offered evidence that earlier surgery would likely have improved the outcome for Mr. Weaver.” However, defendants contend pursuant to N.C. Gen. Stat. § 8C-1, Rule 702(b) (2005) that because plaintiffs’ evidence regarding proximate causation did not come from a neurosurgeon, but rather from experts qualified in the specialized fields of emergency medicine and neurology, such evidence was not competent for purposes of plaintiffs’ meeting their burden of production in order to withstand JNOV. Defendants, though, fail to cite any legal authority for this proposition of law and we find none.¹ Nevertheless, we observe that it is indeed “undisputed that a person is not permitted to offer expert testimony on the appropriate standard of care unless he qualifies under the provisions of Rule 702(b)(2) of the Rules of Evidence. *Andrews v. Carr*, 135 N.C. App. 463, 469, 521 S.E.2d 269, 273 (1999) (emphasis added). However, when the challenged expert testimony relates to causation such admitted testi-

1. The specific issue regarding whether the challenged expert witnesses were properly qualified under N.C. Gen. Stat. § 8C-1, Rule 702 was not assigned as error in the record on appeal, and not properly before this Court for appellate review. *See* N.C.R. App. P. Rule 10(a) ([T]he scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal[.]).

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mony is competent “as long as the testimony is helpful to the jury and based sufficiently on information reasonably relied upon under Rule 703[.]” *Johnson v. Piggly Wiggly of Pinetops, Inc.*, 156 N.C. App. 42, 49, 575 S.E.2d 797, 802 (2003).

After a careful review of the record on appeal, we conclude that plaintiffs presented more than a scintilla of evidence supporting the proximate causation element of their medical negligence action. For example, Dr. Bruce Dobkin, an expert qualified in neurology, testified without objection on direct examination:

Q: Now going back to Mr. Weaver on September 29th, 2000, do you have an opinion, satisfactory to yourself and to a reasonable degree of medical certainty, as to whether or not surgical intervention on that day, the 29th, would have improved Mr. Weaver’s ultimate outcome?

A: Yes

Q: And what is that opinion?

A: . . . [W]ith a high degree of certainty, [plaintiff] would have had virtually no neurological impairments, no trouble with coordination, if he had been operated on [] the 29th.

In addition, Dr. Jackson Allison, an expert qualified in the field of emergency medicine testified, also without objection as follows:

Q: Doctor, would you please explain, in as much detail as you care to explain, why you feel so strongly that an MRI should have been ordered during Dr. Sheppa’s watch on the 29th?

A: I’d be glad to, because the MRI was the only thing that was going to seal the diagnosis. . . . He had some symptomatology, and from my experience, that the sooner that you intervene with somebody who has got some[thing] pushing against the cord, the sooner you intervene, the better the outcome is going to be for the patient. . . . MRI then a neurosurgical consultant, admit the patient, go to surgery immediately. . . . That’s the answer.

Finally, Dr. Gregory Henry, also an expert qualified in emergency medicine, testified, without objection to the following question on direct examination:

Q: Did that decision [to not perform an MRI on plaintiff on 29 September] cause any damage to Mr. Kenneth Weaver?

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A: I believe that had this diagnose—been diagnosed earlier, he would more than likely have had a better neurologic outcome.

Accordingly, as plaintiffs offered competent evidence of proximate causation sufficient to withstand JNOV, the trial court erred by granting the same in favor of defendants.

Reversed.

Judges McGEE and STEPHENS concur.

ANGELA KASHINO, EMPLOYEE, PLAINTIFF v. CAROLINA VETERINARY SPECIALISTS
MEDICAL SERVICES, EMPLOYER, ATLANTIC MUTUAL/GAB ROBINS, CARRIER,
DEFENDANTS

No. COA06-1535

(Filed 16 October 2007)

Workers' Compensation— occupational disease—Lyme disease—failure to show employment placed at increased risk

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee did not prove that there was a causal relationship between her employment as a veterinary technician and her Lyme disease because: (1) although the employment-related accident need not be the sole causative force to render an injury compensable, plaintiff must prove that the accident was a causal factor by a preponderance of the evidence; (2) a doctor's testimony on the issue of causation was at best equivocal, and the portions of the doctor's testimony relied on by plaintiff are not dispositive in light of the doctor's other testimony that supported a finding of no causation; (3) there was competent evidence in the record supporting a finding of no causal link; and (4) although plaintiff contends the Commission's finding of no causation should be rejected based on a consideration of the circumstantial evidence before the Commission as permitted by case law, the dispositive difference between this case and the others cited by plaintiff is that the Commission found causation and awarded benefits in the other cases whereas the Commission found there was no causal relationship between the employment and plaintiff's condition in the instant case.

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Appeal by plaintiff from opinion and award entered 22 August 2006 by the North Carolina Industrial Commission. Heard in the Court of Appeals 6 June 2007.

Bollinger & Piemonte, PC, by Bobby L. Bollinger, Jr. and William C. Winebarger, for plaintiff-appellant.

Hedrick Eatman Gardner & Kincheloe, LLP, by Harmony Whalen Taylor, for defendants-appellees.

GEER, Judge.

Plaintiff Angela Kashino appeals from the North Carolina Industrial Commission's opinion and award denying her claim for workers' compensation benefits. The Commission concluded that plaintiff, who suffers from Lyme disease, failed to carry her burden of demonstrating that her illness was either a compensable injury by accident or an occupational disease. Because there is competent evidence supporting the Commission's finding that plaintiff failed to prove a causal connection between her Lyme disease and her employment, we affirm the opinion and award of the Commission.

Facts

At the time of the hearing before the deputy commissioner in April 2005, plaintiff was 26 years old. Several years earlier, in January 2000, plaintiff began working as a veterinary technician for defendant-employer Carolina Veterinary Specialists Medical Services. Before her job with defendant-employer, plaintiff worked as a receptionist in a different animal hospital, but was not involved in the treatment of animals.

Defendant-employer provides both emergency and ongoing care to animals. Plaintiff worked primarily in the emergency department, where she was responsible for a range of activities, including: carrying and restraining animals, taking vital signs, doing blood work, taking x-rays, giving medication, cleaning cages, and preparing animals for surgery. These and other tasks placed plaintiff in prolonged direct physical contact with hundreds of animals.

Plaintiff testified that she would occasionally spot ticks crawling on the floor or walls of defendant-employer's facility and also on the animals that she treated. She would occasionally find ticks on her body during or after work. Plaintiff specifically recalled that one day, in February 2001, she was treating an injured dog named "Scooby

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Doo,” who was infested with ticks and fleas. According to plaintiff, when she returned home after this shift, she and her husband discovered and removed two small ticks attached to her shoulder.

Over a year after this incident, in March or April 2002, plaintiff began experiencing nausea, vomiting, and headaches while pregnant with her second child. Plaintiff’s symptoms persisted and worsened, such that in April 2003 she began missing substantial time at work. She was treated by doctors throughout this period, but it was not until April or May 2004 that plaintiff was diagnosed with Lyme disease.

Following the diagnosis of Lyme disease, plaintiff came under the care of Dr. Joseph Jemsek, an internist specializing in infectious diseases. In his deposition, Dr. Jemsek explained that Lyme disease is a tick-borne illness transmitted by deer or black-legged ticks. He also indicated that current medical evidence suggests that generally a tick must be attached to its host for approximately 24 hours in order to transmit the Lyme disease-causing bacteria.

After hearing the evidence in this case, Deputy Commissioner George T. Glenn II concluded that plaintiff was not entitled to workers’ compensation benefits—for either an injury by accident or occupational disease—because she had failed to prove a causal relationship between the Lyme disease and her job. On 22 August 2006, the Full Commission adopted the deputy commissioner’s opinion and award with modifications. The Full Commission agreed that plaintiff failed to prove a causal relationship between her condition and her job, but also concluded that plaintiff failed to prove that her job placed her at an increased risk of contracting Lyme disease. Plaintiff timely appealed to this Court.

Discussion

“[A]ppellate review of an award from the Commission is generally limited to two issues: (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact.” *Johnson v. Southern Tire Sales & Serv.*, 358 N.C. 701, 705, 599 S.E.2d 508, 512 (2004). The findings of the Commission are conclusive on appeal when supported by competent evidence, even though there may be evidence to support a contrary finding. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982). “In weighing the evidence, the Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony, and the Commission may reject entirely any testi-

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mony which it disbelieves.” *Hedrick v. PPG Indus.*, 126 N.C. App. 354, 357, 484 S.E.2d 853, 856, *disc. review denied*, 346 N.C. 546, 488 S.E.2d 801 (1997).

Plaintiff first contends the Commission erred in concluding that she did not prove that her employment placed her at an increased risk of contracting Lyme disease. *See Rutledge v. Tultex Corp.*, 308 N.C. 85, 93-94, 301 S.E.2d 359, 365 (1983) (in order to establish occupational disease under N.C. Gen. Stat. § 97-53(13) (2005), plaintiff must show “the employment exposed the worker to a greater risk of contracting the disease than the public generally”); *Minter v. Osborne Co.*, 127 N.C. App. 134, 138, 487 S.E.2d 835, 838 (holding that “[s]ince there is no evidence to support a finding that plaintiff was at an increased risk of insect stings, the conclusion that the sting was an accident or injury arising out of the employment is error and the award of benefits must be reversed”), *disc. review denied*, 347 N.C. 401, 494 S.E.2d 415 (1997). While we agree that plaintiff submitted sufficient expert testimony to support a finding of increased risk, we must nonetheless affirm the Full Commission since it was entitled to conclude, as it did, that plaintiff failed to prove a causal relationship between her employment and the Lyme disease.

It is well settled that, in order to establish a compensable occupational disease, the employee must show “‘a causal connection between the disease and the [claimant’s] employment.’” *Rutledge*, 308 N.C. at 93, 301 S.E.2d at 365 (quoting *Hansel v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E.2d 101, 105-06 (1981)). Likewise, the worker must prove causation if he or she is to recover based on the occurrence of an injury by accident: “An injury is compensable as employment-related if any reasonable relationship to employment exists. Although the employment-related accident need not be the sole causative force to render an injury compensable, the plaintiff must prove that the accident was a causal factor by a preponderance of the evidence.” *Holley v. ACTS, Inc.*, 357 N.C. 228, 231-32, 581 S.E.2d 750, 752 (2003) (internal quotation marks and citations omitted). As explained by our Supreme Court, “[t]o establish the necessary causal relationship for compensation under the Act, ‘the evidence must be such as to take the case out of the realm of conjecture and remote possibility.’” *Chambers v. Transit Mgmt.*, 360 N.C. 609, 616, 636 S.E.2d 553, 557 (2006) (quoting *Gilmore v. Hoke County Bd. of Educ.*, 222 N.C. 358, 365, 23 S.E.2d 292, 296 (1942)).

In this case, plaintiff’s counsel asked Dr. Jemsek whether, “more likely than not, there is a causal connection between the

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disease and [plaintiff's] employment," and the doctor replied, "[t]hat's a fair statement." Dr. Jemsek nonetheless qualified this opinion on cross-examination:

Q. Okay. Dr. Jemsek, is there any definitive way to know whether [plaintiff] contracted Lyme disease due to her job, or just to exposure of daily living, walking to get the mail?

A. No.

Q. Okay. Just because a person is bitten by a tick, and that tick is attached for a minor amount of time, does that, necessarily, immediately lead them to contract Lyme disease?

A. No. It depends on whether the tick is infected.

Q. Okay. The only way to know if that tick is infected—or specifically, in this case, if the tick that infected [plaintiff] was from her job—is if we had that actual tick; is that correct?

A. Correct. Or if she can identify a tick she's quite certain was acquired at work, followed by an EM rash.

Q. Otherwise, if we don't have that tick, or those records that you've just described, it's just speculation as to what we think may have happened?

A. Right.

Q. Okay. Dr. Jemsek, on [d]irect you testified that it was more likely than not, that [plaintiff] contracted Lyme disease from her job—

A. No. *I didn't say that. I said that I think she was at an increased risk for exposure to ticks at a veterinary clinic*

. . . .

Q. And, by that same token, there's no way to know whether she had a primary infection, when she was a child, which was reaggravated by something that occurred from a tick dropping from a tree while she was getting the mail; is that right?

A. That's right. Not necessarily a tick bite. Something traumatic could have happened, or for whatever reason, she lost immune containment, without a known tick bite.

(Emphasis added.) The record thus shows that, on the issue of causation, Dr. Jemsek's testimony was at best equivocal.

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From the evidence presented, the Commission made the following findings:

17. Although plaintiff has testified that she removed two small ticks from her person on February 15, 2001, it would be mere speculation to attribute plaintiff's Lyme Disease to this incident. There has been no evidence that the ticks removed were of the appropriate variety of tick to cause Lyme Disease. Nor has evidence been presented that the ticks removed on February 15, 2001 were attached a sufficient amount of time to transmit Lyme Disease.

18. The undersigned find as fact that plaintiff has failed to prove that there is a causal connection between plaintiff's Lyme disease and her employment.

Plaintiff disputes these findings, contending that Dr. Jemsek's testimony was "sufficient" to carry her burden on the causation issue. While perhaps "sufficient," the portions of Dr. Jemsek's testimony relied on by plaintiff are not dispositive in light of the doctor's other testimony that supports a finding of no causation.

As stated on many occasions, the appellate "court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). By combing the transcript, we could find excerpts supportive of plaintiff's position, but "this Court's role is not to engage in such a weighing of the evidence." *Alexander v. Wal-Mart Stores, Inc.*, 166 N.C. App. 563, 573, 603 S.E.2d 552, 558 (2004) (Hudson, J., dissenting), *adopted per curiam*, 359 N.C. 403, 610 S.E.2d 374 (2005). Since there is competent evidence in the record supporting the finding of no causal link, that finding must stand. *See Carroll v. Town of Ayden*, 160 N.C. App. 637, 642-43, 586 S.E.2d 822, 826-27 (2003) (upholding Commission's finding that plaintiff's hepatitis C infection was not caused by his employment where two doctors presented contrasting testimony and noting, further, that appellate court "cannot overrule the Commission's findings of fact merely because plaintiff presented evidence which would support a contrary finding"), *aff'd per curiam*, 359 N.C. 66, 602 S.E.2d 674 (2004).

Plaintiff further argues that we should reject the Commission's finding of no causation by considering the circumstantial evidence

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before the Commission, as permitted by our case law. *See Booker v. Duke Med. Ctr.*, 297 N.C. 458, 476, 256 S.E.2d 189, 200 (1979) (“In the case of occupational diseases proof of a causal connection between the disease and the employee’s occupation must of necessity be based on circumstantial evidence.”); *Keel v. H & V, Inc.*, 107 N.C. App. 536, 540, 421 S.E.2d 362, 366 (1992) (“Circumstantial evidence of the causal connection between the occupation and the disease is sufficient. . . . Absolute medical certainty is not required.”). According to plaintiff, the circumstantial evidence in this case—namely, that she was frequently exposed to ticks at work; that she was not significantly exposed to ticks outside of work; and that she had no history of Lyme disease prior to working for defendant-employer—is comparable to the evidence in *Booker* and *Keel*.

There is, however, a dispositive difference between this case and *Booker* and *Keel*. In *Booker* and *Keel*, the Court was reviewing an opinion and award in which the Commission found causation and awarded benefits. Here, the Commission found that there was no causal relationship between the employment and plaintiff’s condition. Because the record contains evidence to support that finding, and because we may not review the weight or credibility of this evidence, we must affirm.

Affirmed.

Judges CALABRIA and JACKSON concur.

CAROLINA BANK, PLAINTIFF v. CHATHAM STATION, INC. F/K/A, BOSTIC DEVELOPMENT AT CHATHAM STATION, INC., JEFF L. BOSTIC, MELVIN E. MORRIS, SUE B. MORRIS AND MICHAEL L. FREEMAN, DEFENDANTS

No. COA06-1226

(Filed 16 October 2007)

1. Appeal and Error— appealability—partial summary judgment—writ of certiorari—judicial economy

Although plaintiff’s appeal from the trial court’s order granting defendants’ joint motion for judgment on the pleadings is effectively an order of partial summary judgment and therefore an appeal from an interlocutory order, the Court of Appeals will

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treat the appeal as a petition for writ of certiorari and consider the order on its merits because this case is one of those exceptional cases where judicial economy will be served by reviewing the interlocutory order.

2. Mortgages and Deeds of Trust— foreclosure sale—calculation of deficiency

The trial court did not err in a foreclosure deficiency case by granting defendants' motion for judgment on the pleadings on the issue that the amount yielded by the foreclosure sale for the purpose of calculating the deficiency is \$1,021,911.80, because: (1) the amount for which the property was sold to plaintiff at the foreclosure sale is the amount yielded by the foreclosure sale and is to be used to determine whether a deficiency existed; and (2) the amount of the subsequent sale by plaintiff to a third party was irrelevant.

3. Mortgages and Deeds of Trust— foreclosure deficiency—replying to affirmative defenses

The trial court did not err in a foreclosure deficiency case by granting defendants' motion for judgment on the pleadings under N.C.G.S. § 1A-1, Rule 12(c) even though plaintiff contends it was inequitable given the fact that N.C.G.S. § 1A-1, Rule 7(a) allegedly prevented it from replying to defendants' affirmative defenses, because: (1) plaintiff could have filed a motion under N.C.G.S. § 1A-1, Rule 7(a) requesting permission to file a reply, but failed to do so; (2) plaintiff did bring the defenses of equitable estoppel and unjust enrichment to the attention of the trial court by way of its response to defendant's motion, its trial brief, and its arguments before the trial court; and (3) the dispositive fact in the trial court's order, the amount yielded by the foreclosure sale, was contained in plaintiff's complaint and was undisputed by defendant.

4. Appeal and Error— preservation of issues—failure to obtain ruling at trial

Although plaintiff contends the trial court erred in a foreclosure deficiency case by hearing defendants' joint motion for judgment on the pleadings without disposing of plaintiff's motion to continue, this argument is dismissed because plaintiff did not preserve this question for appellate review when it did not obtain a ruling from the trial court on its motion for a continuance as required by N.C. R. App. P. 10(b)(1).

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Appeal by plaintiff from Order entered 18 April 2006 by Judge Timothy S. Kincaid in Guilford County Superior Court. Heard in the Court of Appeals 11 April 2007.

Sparrow Wolf & Sparrow, P.A., by Donald G. Sparrow and James A. Gregorio, for plaintiff-appellant.

Ivey, McClellan, Gatton & Talcott, LLP, by Edwin R. Gatton, for defendant-appellees.

STROUD, Judge.

Plaintiff appeals from an order entered 18 April 2006 granting defendants' Motion for Judgment on the Pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure. For the reasons that follow, we affirm.

I. Background

On or about 24 November 2003, defendant Chatham Station, Inc. executed a deed of trust for the benefit of plaintiff, giving a security interest in property in Chatham County, North Carolina. The deed of trust secured a line of credit note in the maximum amount of \$2,000,000. Defendants Jeff L. Bostic, Melvin E. Morris, and Michael L. Freeman guaranteed the note.

Defendants defaulted on the note, and foreclosure proceedings were instituted in Chatham County, North Carolina on or about 5 April 2005. Upon foreclosure, plaintiff was the highest bidder and purchased the property for the sum of \$1,021,911.80 and took title to the foreclosed property. A report of foreclosure sale was filed in Chatham County on or about 10 May 2005 showing that plaintiff was the purchaser and highest bidder. Subsequent to the conclusion of the foreclosure sale, plaintiff sold the subject property in an arms length transaction for \$750,000, resulting in net proceeds of \$747,078.18.

On 21 September 2005 plaintiff filed a complaint against defendants for a foreclosure deficiency on the line of credit note, as well as for judicial foreclosure on a deed of trust executed by defendants Melvin E. Morris and Sue B. Morris conveying a security interest on an unrelated parcel of land. The claim for judicial foreclosure was subsequently dismissed by plaintiff because payment was received. Plaintiff went forward with its deficiency claim. The complaint contained two claims for deficiency: (1) an initial deficiency of \$53,693.79, consisting of legal fees, taxes advanced, accrued interest

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and expenses;¹ and (2) \$238,816.87, arising from plaintiff's net proceeds of \$747,078.18 from the subsequent sale of the property.²

On 23 November 2005, defendants Jeff. L. Bostic, Melvin E. Morris and Sue B. Morris filed answers to plaintiff's complaint and included exhibit A, "The Report of Foreclosure Sale," and exhibit B, "The Statement of the Account." Defendant Michael L. Freeman filed an answer on or about 9 December 2005. On 8 March 2006, defendants filed a Joint Motion for Judgment on the Pleadings, with a supporting brief filed on or about 28 March 2006. On 20 March 2006 plaintiff moved for a continuance and filed a response to defendants' Joint Motion for Judgment on the Pleadings. On 31 March 2006, plaintiff filed a brief in opposition to defendants' Joint Motion for Judgment on the Pleadings. On 4 April 2006, the Honorable Timothy S. Kincaid heard oral arguments on defendants' Joint Motion for Judgment on the Pleadings in Superior Court, Guilford County. On 18 April 2006, Judge Kincaid granted defendants' Joint Motion for Judgment on the Pleadings as it related to Claim I of the deficiency in that Plaintiff's foreclosure bid in the amount of \$1,021,911.80 was binding on plaintiff and credited to defendants for the purpose of determining any deficiency.

II. Scope of Review

Plaintiff appeals from the trial court's order granting defendants' Joint Motion for Judgment on the Pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure. However, when "matters outside the pleadings [have been] considered by the [trial] court in reaching its decision on the judgment on the pleadings, the motion [is] treated as if it were a motion for summary judgment" on review by this Court. *Helms v. Holland*, 124 N.C. App. 629, 633, 478 S.E.2d 513, 516 (1996).

In making the decision on defendants' motion for judgment on the pleadings, the trial court's order states that the court considered the briefs submitted by both plaintiff and defendants and the arguments of counsel in addition to the pleadings and exhibits. Therefore the motion for judgment on the pleadings will be treated as motion for summary judgment on appeal.

1. Defendants conceded that they were liable for these items upon valid documentation.

2. The actual numbers from which plaintiff derived this amount as its damages is not clear from the complaint, but the damages were apparently based upon the amount of the debt less the net proceeds from the subsequent sale of the property by plaintiff.

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[186 N.C. App. 424 (2007)]

[1] Because the trial court order did not completely dispose of the case, its order is effectively an order of partial summary judgment and therefore interlocutory. *Wood v. McDonald's Corp.*, 166 N.C. App. 48, 53, 603 S.E.2d 539, 543 (2004). There is generally no right to appeal from an interlocutory order, *Id.*; but cf. *Southern Uniform Rentals v. Iowa Nat'l Mutual Ins. Co.*, 90 N.C. App. 738, 740, 370 S.E.2d 76, 78 (1988) (an interlocutory order is immediately appealable when it affects a substantial right), because most interlocutory appeals tend to hinder judicial economy by causing unnecessary delay and expense, *Love v. Moore*, 305 N.C. 575, 580, 291 S.E.2d 141, 146 (1982). However, because the case *sub judice* is one of those exceptional cases where judicial economy will be served by reviewing the interlocutory order, we will treat the appeal as a petition for a writ of certiorari and consider the order on its merits. *Ziglar v. Du Pont Co.*, 53 N.C. App. 147, 149, 280 S.E.2d 510, 512, *disc. review denied*, 304 N.C. 393, 285 S.E.2d 838 (1981); N.C.R. App. P. 21(a)(1).

An order granting summary judgment is reviewed *de novo*, and

the question on appeal is whether there is a genuine issue as to a material fact and whether defendants are entitled to judgment as a matter of law. This Court must consider the evidence in a light most favorable to the non-moving party, allowing the non-moving party a trial upon a favorable inference as to the facts. In order to prevail under the summary judgment standard, defendants must demonstrate an essential element of plaintiffs' claim is nonexistent or that plaintiffs are unable to produce evidence which supports an essential element of their claim.

Helms, 124 N.C. App. at 633-34, 478 S.E.2d at 516 (internal citations and quotations omitted).

III. Analysis

[2] If the foreclosure sale of real property which secures a non-purchase money³ mortgage fails to yield the full amount of due debt, the mortgagee may sue for a deficiency judgment. *Blanton v. Sisk*, 70 N.C. App. 70, 71, 318 S.E.2d 560, 562 (1984). A deficiency judgment imposes personal liability on the mortgagor for the amount by which the full amount of the debt due exceeds the amount yielded by the

3. The holder of a *purchase money* mortgage or deed of trust is limited to the recovery of the security or to the proceeds from the [foreclosure] sale of the security. *Blanton*, 70 N.C. App. at 71-72, 318 S.E.2d at 562-63 (emphasis added) (citing N.C. Gen. Stat. § 45-21.38). The note underlying the foreclosure action in the case *sub judice* was not a purchase money mortgage or deed of trust.

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foreclosure sale.⁴ *Hyde v. Taylor*, 70 N.C. App. 523, 526, 320 S.E.2d 904, 906 (1984) (quoting *Black's Law Dictionary* 379 (5th ed. 1979)).

The dispositive issue in the case *sub judice* is how to determine the amount yielded by the foreclosure sale for the purpose of calculating the deficiency judgment when the property is subsequently sold for less than the amount bid at foreclosure. Defendants contend that the amount yielded by the foreclosure sale is the amount for which the property was sold to plaintiff at the foreclosure sale. Plaintiff contends that the amount yielded by the foreclosure sale should be determined by the net sales proceeds of the property based upon plaintiff's sale to a third party subsequent to the foreclosure.

Plaintiff cites no authority for its position and we find none. To the contrary, we hold that the amount for which the property was sold to plaintiff at the foreclosure sale is the amount yielded by the foreclosure sale and is to be used to determine whether or not a deficiency exists in the case *sub judice*. The amount of the subsequent sale by plaintiff to a third party is irrelevant.

In the case *sub judice*, the uncontroverted evidence shows that the amount for which the property was sold to plaintiff at the foreclosure sale was \$1,021,911.80. We conclude therefore that there is no genuine issue of material fact as to the amount yielded by the foreclosure sale. Therefore, defendants were entitled to judgment as a matter of law that the amount yielded by the foreclosure sale, for the purpose of calculating the deficiency judgment, is \$1,021,911.80. Accordingly, we overrule this assignment of error.

IV. Procedure

[3] Plaintiff further contends that the trial court's granting of defendants' Joint Motion for Judgment on the Pleadings was inequitable and therefore error, because the trial court's order was based on defendants' affirmative defenses and Rule 7(a) of the North Carolina Rules of Civil Procedure prevented plaintiff from replying to the affirmative defenses, thereby harming plaintiff's ability to present its case to the trial court. However, after reviewing the record, we perceive no inequity for which plaintiff is entitled to relief.

Under N.C. Gen. Stat. § 1A-1, Rule 8(d), allegations of affirmative defenses are deemed denied or avoided, so normally a reply will not

4. N.C. Gen. Stat. § 45-21.36 (2005) allows the debtor an offset against a deficiency judgment in certain cases when the creditor purchases the property at foreclosure with a bid that is substantially less than the true value of the property.

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be necessary to protect the plaintiff's rights. Plaintiff contends that it would have raised defenses of equitable estoppel and unjust enrichment if it had been able to file a reply to defendants' answers. However, if plaintiff believed a reply was necessary, plaintiff could have filed a motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 7(a), requesting permission to file a reply, but plaintiff did not file such a motion. Thus plaintiff's argument that Rule 7(a) has a "somewhat peculiar feature" which makes it impossible for the plaintiff to respond to defendants' alleged affirmative defenses is incorrect. In any event, plaintiff did bring these defenses to the attention of the trial court by way of its response to defendants' motion, its trial brief, and its arguments before the trial court. Additionally, the dispositive fact in the trial court's order, the amount yielded by the foreclosure sale, was contained in plaintiff's complaint and was undisputed by defendant. Accordingly, we conclude that this assignment of error is without merit.

V. Motion to Continue

[4] Plaintiff contends that the trial court erred in hearing defendants' Joint Motion for Judgment on the Pleadings without disposing of plaintiff's motion to continue. However, [i]n order to preserve a question for appellate review, a party must have . . . obtain[ed] a ruling upon the party's . . . motion. N.C.R. App. P. 10(b)(1).

The record before us does not indicate that plaintiff obtained a ruling from the trial court on plaintiff's Motion for Continuance. Therefore this question was not properly preserved for appellate review, and this assignment of error is therefore dismissed.

VI. Conclusion

For the foregoing reasons, we conclude the trial court did not err when it entered an order granting defendants' Rule 12(c) motion for judgment on the pleadings. Accordingly, that order is affirmed.

Affirmed.

Judges McCULLOUGH and CALABRIA concur.

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[186 N.C. App. 431 (2007)]

WILLIAM B. MORRIS, PLAINTIFF v. MARVIN R. MOORE AND GLORIA M. MOORE,
DEFENDANTS

No. COA07-181

(Filed 16 October 2007)

1. Civil Procedure— motion to dismiss converted to summary judgment—matters outside pleadings presented to court

The trial court did not abuse its discretion by granting summary judgment in favor of defendants after a hearing on defendants' motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) in an action where plaintiff sought to get the trial court to order defendants to execute a deed returning ownership of property to him based on his living on the property and paying the taxes and upkeep on the property, because: (1) when matters outside of the pleadings are presented to the trial court during a hearing considering a motion to dismiss under Rule 12(b)(6) and the material is not excluded by the trial court, the motion is treated as one for summary judgment and disposed of under N.C.G.S. § 1A-1, Rule 56; and (2) the transcript of the hearing on defendants' motion to dismiss revealed that the trial court received and considered several documents outside of the pleadings.

2. Civil Procedure— motion to dismiss converted to summary judgment—reasonable opportunity to present material—waiver

The trial court did not err by granting summary judgment in favor of defendants allegedly without providing plaintiff an opportunity to respond in an action where plaintiff sought to get the trial court to order defendants to execute a deed returning ownership of property to him based on his living on the property and paying the taxes and upkeep on the property, because: (1) plaintiff did not request a continuance or additional time to produce evidence; (2) plaintiff did not object to the admission of material outside the pleadings; and (3) plaintiff waived his right to complain when he himself first offered material outside of the pleadings to the trial court for consideration.

3. Appeal and Error— preservation of issues—failure to object

Although plaintiff contends the trial court erred by granting summary judgment in favor of defendants when defendants presented no admissible evidence in support of their motion based

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on a failure to properly authenticate an order from the Bankruptcy Court as required by N.C.G.S. § 8C-1, Rules 901 or 902, this assignment of error was not preserved for appellate review because plaintiff did not object to the admission of the order as required by N.C. R. App. P. 10(b)(1).

4. Collateral Estoppel and Res Judicata— collateral estoppel—issue fully determined—final judgment on merits

The trial court did not err by granting summary judgment in favor of defendants even though plaintiff contends defendants failed to establish all of the elements of res judicata or collateral estoppel in an action where plaintiff sought to get the trial court to order defendants to execute a deed returning ownership of property to him based on his living on the property and paying the taxes and upkeep on the property, because: (1) defendants met their burden of establishing that plaintiff's current claim regarding the property was barred by the doctrine of collateral estoppel since the issue of whether the conveyance of the property to defendants was valid or limited in any way was fully determined by the Bankruptcy Court and its order constituted a final judgment on the merits; and (2) having determined that collateral estoppel applied, the Court of Appeals did not need to address plaintiff's argument as to res judicata.

Appeal by plaintiff from an order entered 28 September 2006 by Judge James C. Davis in Cabarrus County Superior Court. Heard in the Court of Appeals 13 September 2007.

Koehler & Cordes, PLLC, by Stephen D. Koehler, for plaintiff-appellant.

Shuford, Hunter & Brown, P.A., by Angela M. Heath, for defendant-appellees.

BRYANT, Judge.

William B. Morris (plaintiff) appeals from an order entered 28 September 2006 granting summary judgment in favor of Marvin R. and Gloria M. Moore (defendants). For the reasons stated herein, we affirm the order of the trial court.

Facts and Procedural History

Plaintiff lives with his wife on property located at 8980 Rocky River Road in Harrisburg, North Carolina (hereinafter, "the prop-

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erty”). Plaintiff purchased the property in 1963, but subsequently deeded the property to defendants in 1998. Defendant Gloria Moore is plaintiff’s daughter.

On 26 September 2002, defendants filed for bankruptcy relief in the United States Bankruptcy Court, Western District of North Carolina, Charlotte Division. Plaintiff subsequently filed a motion in defendants’ bankruptcy case “to abandon certain real property known as 8980 Rocky River Road . . . and for relief from the automatic stay of 11 U.S.C. Section 362 as to said property[.]” The Bankruptcy Court held a hearing on plaintiff’s motion on 28 August 2003, and entered an order on 23 September 2003 denying plaintiff’s motion to abandon the property and for relief from the stay.

Plaintiff filed his complaint initiating the case at hand on 9 February 2006. Defendants failed to respond to plaintiff’s complaint. Plaintiff filed a motion for entry of default judgment on 11 April 2006 and obtained an entry of default by the Clerk of Superior Court. On 30 May 2006, the matter came before the trial court on plaintiff’s motion for default judgment. The trial court found that plaintiff’s complaint did “not state any grounds for relief,” and denied plaintiff’s motion for entry of a default judgment, but allowed plaintiff leave to amend his pleadings to state grounds for relief.

On 31 May 2006, plaintiff filed an amended complaint, the *gravamen* of which is that because plaintiff has lived on the property and paid the taxes and upkeep on the property, the trial court should order defendants to execute a deed returning ownership of the property to him. On 2 August 2006, defendants filed a responsive pleading entitled “Motion to Dismiss; Answer; Affirmative Defenses; Rule 11 Attorney’s Fees.” Defendants’ motion to dismiss was heard on 25 September 2006 and an order granting summary judgment in favor of defendants was entered on 28 September 2006. Plaintiff appeals.

Plaintiff raises the issues of whether the trial court erred by granting summary judgment in favor of defendants: (I) after a hearing on defendants’ motion to dismiss pursuant to Rule 12(b)(6); (II) without providing plaintiff an opportunity to respond; (III) where defendants had presented no admissible evidence in support of their motion; and (IV) where defendants had failed to establish all of the elements of *res judicata* or collateral estoppel.

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I

[1] Plaintiff first contends the trial court erred by entering an order granting summary judgment in favor of defendants after a hearing on defendants' motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. We disagree.

When material outside of the pleadings is presented to the trial court during a hearing considering a motion to dismiss pursuant to Rule 12(b)(6), and the material is not excluded by the trial court, the motion is treated as one for summary judgment and disposed of pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 12(b) (2005); *Carlisle v. Keith*, 169 N.C. App. 674, 688-90, 614 S.E.2d 542, 551-52 (2005). We review a trial court's conversion of a motion to dismiss pursuant to Rule 12(b)(6) to a motion for summary judgment pursuant to Rule 56 for an abuse of discretion. *Belcher v. Fleetwood Enters.*, 162 N.C. App. 80, 84, 590 S.E.2d 15, 18 (2004).

The transcript of the hearing on defendants' motion to dismiss reveals that the trial court received and considered several documents outside of the pleadings, including: a release from a tax lien indicating plaintiff had paid over \$2,100 in taxes due on the property; plaintiff's check tendered in payment of the taxes; the complaint filed by plaintiff in Bankruptcy Court; and the order dismissing plaintiff's complaint in Bankruptcy Court. Accordingly, defendants' motion to dismiss pursuant to Rule 12(b)(6) was correctly treated as a motion for summary judgment pursuant to Rule 56 and the trial court did not abuse its discretion in entering its order pursuant to Rule 56. This assignment of error is overruled.

II

[2] Plaintiff also contends the trial court erred in granting summary judgment in favor of defendants without providing plaintiff an opportunity to respond. We disagree.

When a motion to dismiss pursuant to Rule 12(b)(6) is treated as a motion for summary judgment pursuant to Rule 56 because of the consideration of material outside of the pleadings, the parties must be given a reasonable opportunity to present material pertinent to a Rule 56 motion. N.C. Gen. Stat. § 1A-1, Rule 12(b) (2005); *Raintree Homeowners Ass'n. v. Raintree Corp.*, 62 N.C. App. 668, 673, 303 S.E.2d 579, 582, *disc. review denied*, 309 N.C. 462, 307 S.E.2d 366 (1983). However, this Court has held that

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the notice required by Rule 12(b) in situations where . . . a 12(b)(6) motion is being treated as a motion for summary judgment is procedural rather than constitutional. . . . By participating in the hearing and failing to request a continuance or additional time to produce evidence, a party waives his right to this procedural notice.

Raintree, 62 N.C. App. at 673, 303 S.E.2d at 582 (internal citations omitted); *see also Belcher*, 162 N.C. App. at 84, 590 S.E.2d at 18 (holding where plaintiffs had participated in a hearing on a Rule 12(b)(6) motion and did not request a continuance or additional time to produce evidence, the plaintiffs could not “complain that they were denied a reasonable opportunity to present materials to the court”).

Here, plaintiff did not request a continuance or additional time to produce evidence. Plaintiff did not object to the admission of material outside the pleadings. In fact, plaintiff himself first offered material outside of the pleadings to the trial court for its consideration. Plaintiff has waived his right to complain he was denied a reasonable opportunity to present material to the trial court. This assignment of error is overruled.

III

[3] Plaintiff next argues the trial court erred in granting summary judgment in favor of defendants because defendants had presented no admissible evidence in support of their motion. Specifically, plaintiff contends the order from the Bankruptcy Court admitted into evidence was not properly authenticated pursuant to Rules 901 or 902 of the North Carolina Rules of Evidence and thus was not competent evidence upon which the trial court could rely. Plaintiff, however, did not object to the admission of the order and has thus failed to preserve this argument for our review. N.C. R. App. P. 10(b)(1) (“In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion[.]”).

IV

[4] Plaintiff lastly argues the trial court erred by granting summary judgment in favor of defendants because defendants had failed to establish all of the elements of *res judicata* or collateral estoppel. We disagree.

To establish the elements of collateral estoppel, defendants must show: “ [1] the earlier suit resulted in a final judgment on the merits,

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[2] that the issue in question was identical to an issue actually litigated and necessary to the judgment, and [3] that both [defendants] and [plaintiff] were either parties to the earlier suit or were in privity with parties.’ ” *Gregory v. Penland*, 179 N.C. App. 505, 513, 634 S.E.2d 625, 631 (2006) (quoting *Thomas M. McInnis & Assocs. v. Hall*, 318 N.C. 421, 429, 349 S.E.2d 552, 557 (1986)). We note, however, that the third element of collateral estoppel is not required “when collateral estoppel is being used ‘against a party who has previously had a full and fair opportunity to litigate a matter and now seeks to reopen the identical issues with a new adversary.’ ” *Id.* at 514, 634 S.E.2d at 631 (quoting *Hall*, 318 N.C. at 434, 349 S.E.2d at 560).

At the hearing on defendants’ motion to dismiss, plaintiff argued that while he had conveyed the property to defendants, the conveyance was merely for defendants to “hold” the property and the property was supposed to be returned to him. Plaintiff further argued that because of his payment of the tax lien, the property “was supposed to be given back to me. My daughter didn’t do that.”

Plaintiff filed his motion in defendants’ bankruptcy case in an attempt to remove the property from defendants’ bankruptcy estate, apparently presenting arguments similar to those in the case at hand. In the order by the Bankruptcy Court dismissing plaintiff’s motion, the court, in pertinent part, found and concluded:

3. On January 3, 1998 a general warranty deed was executed transferring the property from William Benton Morris and wife . . . to the debtors, Marvin Rae Moore and wife, Gloria Morris Moore.
4. The transfer of said property to the debtors was a gift and was recorded of public record at the Cabarrus County, North Carolina Register of Deeds on March 2, 1998.
5. The conveyance was a gift and no trust obligation was associated with the transfer.
6. There was no fraud involved in the transfer of said property to the debtors.
7. The debtors were not unjustly enriched.
8. There is no equitable basis for imposing a constructive trust.
9. There is no resulting trust as one cannot be engrafted into a fee simple warranty deed.

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10. All legal and equitable interests in the property should remain in the debtors' bankruptcy estate as provided by 11 U.S.C. Section 541(1).

Thus, the issue of whether the conveyance of the property to defendants was valid or limited in any way was fully determined by the Bankruptcy Court and its order constitutes a final judgment on the merits. Defendants have met their burden in establishing that plaintiff's current claim regarding the property is barred by the doctrine of collateral estoppel.

Having determined that collateral estoppel applies we need not address plaintiff's argument as to *res judicata*. This assignment of error is overruled.

Affirmed.

Judges STEELMAN and GEER concur.

STATE OF NORTH CAROLINA v. CALVIN MONTRELLE HARRIS

No. COA07-39

(Filed 16 October 2007)

Robbery— actual force—necklace snatched from neck

There was sufficient evidence to support a conviction for common law robbery where defendant snatched a gold necklace from the victim's neck and the necklace broke as the defendant ripped it off. Although North Carolina courts have not addressed the precise issue of whether snatching a necklace from a person's neck involves sufficient actual (as opposed to constructive) force to constitute robbery, a necklace is attached to a person in a way that offers resistance to anyone who would try to pull it from the person's neck. There is a higher risk of bodily injury when a necklace is torn from a person's neck and broken in the process than when a purse is merely grabbed from a shoulder.

Appeal by defendant from judgment entered 16 August 2006 by Judge Kenneth C. Titus in Durham County Superior Court. Heard in the Court of Appeals 10 September 2007.

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[186 N.C. App. 437 (2007)]

Attorney General Roy Cooper, by Assistant Attorney General Larissa S. Ellerbee, for the State.

Robert W. Ewing for defendant-appellant.

MARTIN, Chief Judge.

Defendant was convicted by a jury of common law robbery. He appeals from a judgment entered upon the verdict sentencing him to a minimum term of 12 months and a maximum term of 15 months. This sentence was suspended on the condition that defendant serve an active term of 90 days and be placed on probation for 30 months. For the reasons stated below, we find no error in his trial.

The State presented evidence at trial which tended to show that sometime between one and two o'clock in the morning on 29 September 2005, Ansumana Kai Kai ("Kai Kai") was leaving Club 9 on Ninth Street in Durham accompanied by a friend. Kai Kai was wearing a gold necklace with an eagle medallion attached to it. He paid \$550 for these items. As Kai Kai reached the parking lot, defendant came from behind him and snatched the necklace from his neck. The necklace broke in half and defendant ran off. Kai Kai asked his friend to go find a police officer and then proceeded to run after defendant. When Kai Kai caught up with defendant, he saw that defendant had six men with him. The men began punching at Kai Kai.

Officer Jason Evans, a police officer with the Durham Police Department, was working off-duty as a security guard for Club 9 that evening. Officer Evans saw defendant running north across the parking lot with a group of men running after him. Officer Evans had noticed defendant earlier that evening when defendant was ejected from Club 9 after becoming involved in an altercation, and again when defendant attempted to re-enter Club 9. Officer Evans informed Investigator D.A. Gaither ("Investigator Gaither"), another Durham police officer working off-duty at Club 9, that there was an altercation in the parking lot, and the two ran over to the area. Investigator Gaither had also seen defendant earlier in the evening when he was ejected from Club 9, and again when defendant attempted to re-enter the club. Investigator Gaither also saw Kai Kai chasing defendant across the parking lot.

Officer Evans and Investigator Gaither proceeded to the parking lot, where they saw defendant standing with a group of men who were yelling and cursing at Kai Kai. Kai Kai identified defendant to

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the officers as the person who had stolen his necklace, and defendant put his hands up in the air and began to walk away. Officer Evans and Investigator Gaither asked defendant to stop but he continued to walk away, so they handcuffed defendant and placed him in Investigator Gaither's patrol car. As defendant sat in the patrol car, Kai Kai again identified him as the man who stole his necklace. Officer Evans later searched defendant and did not find the eagle charm or any pieces of the gold chain. The trial court denied defendant's motion to dismiss made at the close of the State's evidence.

Defendant testified on his own behalf. He testified that after he was ejected from Club 9, he waited outside for a friend who had driven him there. When the club closed, his friend called him, and he began jogging to the car. As he did so, Kai Kai began to chase him, grabbed him, and asked him about the chain. The police arrived shortly thereafter. Defendant denied taking the chain. At the close of his evidence, defendant renewed his motion to dismiss, and it was also denied.

Defendant argues that the trial court erred in failing to dismiss the charge of common law robbery based on insufficient evidence. " 'When a defendant moves for dismissal, the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense. If so, the motion to dismiss is properly denied.' " *State v. Bellamy*, 172 N.C. App. 649, 656, 617 S.E.2d 81, 87 (2005) (quoting *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651-52 (1982)), *disc. rev. denied*, 360 N.C. 290, 628 S.E.2d 384 (2006). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995). In ruling on a motion to dismiss, the court must view the evidence in the light most favorable to the State. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992).

Common law robbery requires proof of four elements: "(1) the felonious, non-consensual taking of (2) money or personal property (3) from the person or presence of another (4) by means of violence or fear." *State v. Hedgecoe*, 106 N.C. App. 157, 161, 415 S.E.2d 777, 780 (1992). Defendant contends that the State failed to present sufficient evidence of the element of force. The force used may be actual or constructive. *State v. Sawyer*, 224 N.C. 61, 65, 29 S.E.2d 34, 37 (1944). "[A]ctual force implies personal violence," and the degree of force used must be sufficient to induce the victim to part with his or her

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property. *Id.* Constructive force includes any demonstration of force that puts the victim in fear to the extent that he or she is induced to part with the property. *Id.* In the present case, no threats or other demonstrations of force were made, so we must determine whether there was sufficient actual force.

North Carolina courts have not addressed the precise issue of whether the snatching of a necklace attached to the neck of a person involves sufficient actual force to constitute robbery. We therefore look to other jurisdictions for guidance. The majority of states that have considered the level of force required for robbery have held that a snatching involves sufficient force if the article taken is so attached to the person of the victim as to afford resistance. *See, e.g., Smith v. State*, 43 S.E. 736, 736-37 (Ga. 1903) (finding sufficient force where the defendant snatched the victim's purse, breaking the chain attaching it to her person in the process); *People v. Taylor*, 541 N.E.2d 677, 680 (Ill. 1989) (finding sufficient force where a necklace was snatched from the victim's neck); *Raiford v. State*, 447 A.2d 496, 500 (Md. Ct. Spec. App. 1982), *aff'd in relevant part*, 462 A.2d 1192, 1195-97 (Md. Ct. App. 1983) (finding sufficient force where a purse was "ripped" from the victim's shoulder); *State v. Robertson*, 740 A.2d 330, 334 (R.I. 1999) (finding sufficient force where a necklace was snatched from the victim's neck).

Two cases are particularly persuasive. In *State v. Robertson*, the Supreme Court of Rhode Island held that sufficient force existed to support a conviction for robbery where the defendant grabbed two gold chains from around the victim's neck. *Robertson*, 740 A.2d at 334. The Court stated that "[t]he risk of bodily injury that underlies the more severe treatment of robbery is present when the item that is being snatched is attached to the body or the clothing of the victim." *Id.* The Court concluded that a necklace is so attached to a person that a necklace-snatching involves enough resistance and risk of bodily harm to constitute sufficient force to support a robbery conviction. *Id.*

In *People v. Taylor*, the Supreme Court of Illinois held that sufficient force existed to uphold a conviction for robbery where the defendant snatched a gold chain from the victim's neck and then walked away. *Taylor*, 541 N.E.2d at 680. The Court reasoned that:

Sufficient force to constitute robbery may be found when the article taken is so attached to the person or clothes as to create resistance, however slight. A person may attach an item to his or her

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person or clothing in such a manner that a perpetrator may not take the item without the use of force sufficient to overcome the resistance created by the attachment.

Id. at 679 (internal citations and quotations omitted). The Court found that the necklace was attached to the victim's person in such a way that "it offered resistance to anyone who would take it without permission[,]" and that the defendant "had to use force sufficient to overcome this resistance in order to successfully take the necklace." *Id.* at 680. The Court distinguished this fact pattern from a typical purse snatching scenario where the force used would be insufficient to support a conviction for robbery. *Id.* at 680-81. In a typical nonviolent purse-snatching involving no injury to the victim, the Court reasoned, the purse is not as attached to the person and can be grabbed with less resistance. *Id.* at 681.

Defendant argues that our holding in *State v. Robertson*, 138 N.C. App. 506, 509-10, 531 S.E.2d 490, 492-93 (2000), dictates that the evidence in the present case can only support a conviction for larceny from the person. In *Robertson*, this Court held that there was insufficient evidence of actual or constructive force to support a conviction for common law robbery where the defendant snatched the victim's purse from her shoulder without employing any violence or threats to induce her to hand over the purse. *Id.* at 509-10, 531 S.E.2d at 493. We vacated the defendant's conviction for robbery and remanded for entry of a judgment of guilty as to the lesser-included offense of larceny from the person. *Id.* at 510, 531 S.E.2d at 493.

We distinguish *Robertson* from the present case in terms of the level of attachment of the item to the person and the amount of resistance created when the item is snatched. Here, a necklace, not a purse, was snatched, and a necklace is attached to a person in such a way that it offers resistance to anyone who would try to pull it from the person's neck. The necklace was fastened around Kai Kai's neck, and it broke as defendant ripped it off. In *Robertson*, the purse was not fastened to the victim in any way and the purse strap was not broken, indicating that there was less attachment to the person and less resistance than in the present case. *Id.* at 509, 531 S.E.2d at 493. We believe there is also a higher risk of bodily injury when a necklace is torn from a person's neck and broken in the process than when a purse is merely grabbed off a person's shoulder. Of course, a more violent purse snatching could provide the level of force required for a conviction for robbery. See *State v. Watson*, 283 N.C. 383, 384, 196 S.E.2d 212, 213 (1973) (holding that sufficient force existed to sup-

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port a conviction for robbery when the defendant snatched the victim's purse from her arm, breaking the purse strap and dislocating the victim's arm).

When the foregoing evidence is considered in the light most favorable to the State, and the State is given every reasonable inference to be drawn therefrom, it shows that defendant used enough force in removing a firmly attached necklace to create resistance and a risk of bodily harm, which is sufficient to support a conviction for robbery.

No error.

Judges STROUD and ARROWOOD concur.

JAMES ATKINSON, PLAINTIFF v. TANYA LYNN LESMEISTER AND MARY LOU MOTT,
ADMINISTRATRIX OF THE ESTATE OF WILLIAM LEE MOTT, DEFENDANTS

No. COA06-1677

(Filed 16 October 2007)

1. Process and Service— failure to secure service of process—dismissal of action with prejudice—agency claim

The trial court did not err in a negligence action arising out of an automobile accident by dismissing plaintiff's complaint against defendant estate with prejudice because: (1) plaintiff's failure to secure service of process on the individual defendant, the purported driver of the vehicle involved in the accident, absolved the owner of the automobile, the deceased, of any liability; (2) although plaintiff properly filed both his original complaint and his complaint following the voluntary dismissal within three years of the accident, plaintiff's action must be discontinued under N.C.G.S. § 1A-1, Rule 4(e) since he failed to have an endorsement by the clerk or an alias and pluries summons issued following the expiration of the statute of limitations, and his claim against the individual defendant is a claim against an agent; (3) although it was not necessary to name the individual defendant as a party in the original action, once named as a party, she was required to have proper service; (4) such a dismissal is with prejudice, and operates as a disposition on the merits and pre-

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cludes litigation in the same manner as if the action had been prosecuted to a full adjudication against plaintiff; and (5) the individual defendant has no liability to impute to the estate since the summons as to the individual defendant was allowed to lapse and the statute of limitations has since run.

2. Agency— prima facie case—mistaken use of rule of evidence as a rule of law

The trial court did not err in a negligence action arising out of an automobile accident by dismissing plaintiff's complaint against an estate with prejudice even though plaintiff contends he had a prima facie case of agency under N.C.G.S. § 20-71.1 that survived defendant's motion to dismiss, because: (1) plaintiff mistakenly used N.C.G.S. § 20-71.1 as a rule of law rather than a rule of evidence; (2) the purpose of N.C.G.S. § 20-71.1 was to establish a ready means of proving agency in any case where it is charged that the negligence of a nonowner operator causes damage to the property or injury to the person of another; and (3) plaintiff cannot use a rule of evidence to establish he had a prima facie case of agency that survived defendant's motion to dismiss.

Appeal by plaintiff from order entered 29 September 2006 by Judge Steve A. Balog in Sampson County Superior Court. Heard in the Court of Appeals 22 August 2007.

Brent Adams & Associates, by Brenton D. Adams, for plaintiff-appellant.

Walker, Allen, Grice, Ammons & Foy, LLP, by O. Drew Grice, Jr., for defendants-appellees.

CALABRIA, Judge.

James Atkinson ("plaintiff") appeals from order by the trial court dismissing his action with prejudice. We affirm.

On or about 20 March 2003, plaintiff was a passenger in a vehicle driven by Tanya Lesmeister ("defendant Lesmeister") that was involved in a motor vehicle accident. The motor vehicle was owned by William Lee Mott who subsequently died on 25 July 2003. Mary Lou Mott ("defendant Mott") qualified as the Administratrix of the Estate of the Late William Lee Mott ("the Estate").

As a result of the accident, plaintiff suffered serious injuries. On 10 February 2006, plaintiff filed a second complaint, approximately

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two weeks after filing a voluntary dismissal without prejudice for the initial complaint which had been filed on 31 January 2006. On 12 April 2006, plaintiff obtained service of process on the Estate, but service was never obtained on defendant Lesmeister. Defendant Mott filed an answer on 9 June 2006, after the court granted an extension of time for her to file an answer. Defendant Mott's answer, on behalf of the Estate, included a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, and also alleged plaintiff's claim for relief was barred by the applicable statute of limitations. Subsequently, on 24 July 2006, defendant Mott filed a separate motion to dismiss and alleged *inter alia*, "there are no independent claims of negligence against the Estate."

On 27 July 2006, plaintiff moved the court for leave to file an amended complaint. The trial court granted plaintiff's motion on 18 September 2006. On 29 September 2006, the Honorable Steve A. Balog, Superior Court Judge presiding, signed an order dismissing plaintiff's complaint against the Estate. Plaintiff appeals.

[1] Plaintiff argues on appeal that the trial court erred in dismissing plaintiff's complaint against the Estate. Plaintiff argues the Estate was properly served and plaintiff's amended complaint validly set out a cause of action against the Estate based upon the legal theory of respondeat superior. We disagree.

The crucial issue in this case is whether plaintiff's failure to secure service of process on defendant Lesmeister, the purported driver of the vehicle involved in the accident, also absolves the owner of the automobile, the late William Lee Mott, of any liability.

The standard of review for the dismissal of a complaint is *de novo*. *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003). "The word '*de novo*' means fresh or anew; for a second time; and a *de novo* trial in appellate court is a trial as if no action whatever had been instituted in the court below." *In Re Hayes*, 261 N.C. 616, 622, 135 S.E.2d 645, 649 (1964) (quoting *In Re Farlin*, 350 Ill. App. 328, 112 N.E.2d 736 (Ill. App. 1953)).

A motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure tests the legal sufficiency of the complaint by presenting "the question whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Lynn v. Overlook Development*, 328 N.C. 689, 692, 403 S.E.2d 469, 471 (1991)

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(citation omitted), *rev'd in part on other grounds*, 328 N.C. 689, 403 S.E.2d 469 (1991). "The complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief." *Block v. County of Person*, 141 N.C. App. 273, 277-78, 540 S.E.2d 415, 419 (2000). "The plaintiff must allege the substantive elements of a valid claim." *Acosta v. Byrum*, 180 N.C. App. 562, 566-67, 638 S.E.2d 246, 250 (2006) (citing *Hewes v. Johnston*, 61 N.C. App. 603, 604, 301 S.E.2d 120, 121 (1983)).

Rule 4 of the North Carolina Rules of Civil Procedure governs this case. Rule 4(e) of the North Carolina Rules of Civil Procedure states as follows:

[w]hen there is neither endorsement by the clerk nor issuance of alias or pluries summons within the time specified in Rule 4(d), the action is discontinued as to any defendant not theretofore served with summons within the time allowed. Thereafter, alias or pluries summons may issue, or an extension be endorsed by the clerk, but, as to such defendant, the action shall be deemed to have commenced on the date of such issuance or endorsement.

N.C. Gen. Stat. § 1A-1, Rule 4 (2007).

Rule 4(b) establishes that each defendant must be served with a summons. If a summons cannot be served within the time allowed, an extension may be granted according to Rule 4(d). Here, plaintiff properly filed both his original complaint, and his complaint following the voluntary dismissal, within three years of the accident. However, plaintiff's action must be discontinued pursuant to Rule 4(e) for two reasons. First, he failed to have an endorsement by the clerk or an alias and pluries summons issued following the expiration of the statute of limitations. Second, his claim against Lesmeister is a claim against an agent.

Although it was not necessary to name Lesmeister as a party in the original action, once named as a party, she was required to have proper service. *See Graham v. Hardee's Food Systems*, 121 N.C. App. 382, 385, 465 S.E.2d 558, 560 (1996) (a principal is properly dismissed given once it has been "judicially determined" that the employee or agent is not liable for any tortious conduct); N.C. Gen. Stat. § 1A-1, Rule 41(a) ("notice of dismissal operates as an adjudication on the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on

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or including the same claim”). Furthermore, in *Barnes v. McGee*, 21 N.C. App. 287, 289, 204 S.E.2d 203, 205 (1974), this Court held that such a dismissal is “with prejudice,” and it operates as a disposition on the merits and precludes subsequent litigation in the same manner as if the action had been prosecuted to a full adjudication against the plaintiff. In the case *sub judice*, since the summons as to Lesmeister was allowed to lapse and the statute of limitations has since run, Lesmeister has no liability to impute to the Estate. Therefore, neither Lesmeister nor the Estate can be determined judicially to be negligent. Thus, plaintiff’s cause of action against the Estate must fail.

[2] Lastly, plaintiff argues he has established a *prima facie* case of agency pursuant to N.C. Gen. Stat. § 20-71.1 (2006) and is therefore entitled to judgment in his favor. However, plaintiff’s reliance on N.C. Gen. Stat. § 20-71.1 is misplaced. This statute provides:

In all actions to recover damage for injury to the person or to property . . . rising out of an accident or collision involving a motor vehicle, proof of ownership of such motor vehicle at the time of such incident or collision shall be *prima facie* evidence that the motor vehicle is being operated and used with the authority, consent, and knowledge of the owner in the very transaction out of which injury or cause of action arose.

N.C. Gen. Stat. § 20-71.1 (2006).

Plaintiff asserts defendant failed to deny the deceased owned the automobile involved in the collision; therefore, defendant admitted that the deceased was the owner of the automobile. Plaintiff asserts defendant’s admission suffices, by virtue of N.C. Gen. Stat. § 20-71.1, as a matter of law to establish a *prima facie* case of liability against the defendant under the legal doctrine of respondeat superior. Plaintiff mistakenly uses N.C. Gen. Stat. § 20-71.1 as a rule of law rather than a rule of evidence. *Hartley v. Smith*, 239 N.C. 170, 177, 79 S.E.2d 767, 772 (1954). “The statute was designed to create a rule of evidence. Its purpose is to establish a ready means of proving agency in any case where it is charged that the negligence of a nonowner operator causes damage to the property or injury to the person of another.” *Id.* (citation omitted).

In conclusion, since the driver of the automobile was not properly served, she cannot be held liable for negligence, and therefore there is no negligence to impute to the owner of the automobile. Because there is no negligence to impute to the owner of the auto-

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mobile, plaintiff cannot use a rule of evidence to establish plaintiff has a *prima facie* case of agency that survives defendant's motion to dismiss and the order of the trial court is affirmed.

Affirmed.

Judges GEER and JACKSON concur.

STATE OF NORTH CAROLINA v. TRONE BRONKEITH TILLERY

No. COA07-23

(Filed 16 October 2007)

Assault— board as deadly weapon—lesser included offense

The trial judge in a felony assault prosecution correctly concluded that the issue of whether a 2x4 board was a deadly weapon was for the jury, but should then have instructed on the lesser included misdemeanor of assault inflicting serious injury.

Appeal by defendant from judgment entered 27 July 2006 by Judge W. Russell Duke, Jr. in Edgecombe County Superior Court. Heard in the Court of Appeals 30 August 2007.

Attorney General Roy Cooper, by Assistant Attorney General Barbara A. Shaw, for the State.

Haral E. Carlin, for defendant-appellant.

STEELMAN, Judge.

Having correctly determined that the jury must decide whether a “2x4 board” was a deadly weapon for purposes of a felony assault, the trial court erred in not submitting the lesser included offense of assault inflicting serious injury to the jury.

The State's evidence at trial tended to show that, on the evening of 1 May 2005, Scott Lewis suffered a fractured skull, a broken jaw, and other injuries as the result of a severe beating that took place at defendant's home at the hands of two men. Lewis and others had been working at the defendant's home throughout the afternoon, and the defendant was present. There was no trouble during the daylight

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hours. Crack cocaine and marijuana were available, and the victim acknowledged using drugs that day. Later in the evening, a friend of the defendant, known to Lewis only by his nickname of “B,” arrived. The beating occurred after B’s arrival. Lewis’ skull was cracked in two places, he suffered a brain hemorrhage, his jaw was broken, and four of his teeth were knocked loose. He spent several days in intensive care and was out of work for six months.

Defendant was indicted for assault with a deadly weapon with intent to kill inflicting serious injury. The indictment identified the deadly weapon as “a 2x4 board, a deadly weapon[.]”

At trial, Lewis identified the defendant as one of two men who had “stomped and kicked and beat [him] repeatedly.” When asked to “start from the beginning,” Lewis responded that “[I]t was late evening before his friend got there. And all I remember is the first flash of when the two by four hit me in my face.” Lewis could not identify which of the men wielded the two by four, but was certain that there were two men. He testified that he had known the defendant for three or four months, but knew him only as “Weasel.” He had only seen “B” once or twice.

Lewis was interviewed on the evening of the assault. Deputy Owens testified that Lewis told him that “some guys . . . had hit him with a two by four and stomped him and beat him” and identified his attacker as “B.” Owens denied that the victim had identified “Weasel” as one of his attackers. The victim’s father and Corporal Sewell both testified that the victim identified both “B” and “Weasel” as his attackers. The officers never determined the identity of “B” and never found a bloodstained two by four board or any other bloodstained lumber or implement at defendant’s house or yard.

The defendant presented no evidence but moved the Court to dismiss the charges. This motion was denied. The trial court instructed the jury on assault with a deadly weapon with intent to kill inflicting serious injury and assault with a deadly weapon inflicting serious injury but denied the defendant’s request to instruct the jury on the lesser-included charge of misdemeanor assault inflicting serious injury. The trial court gave a peremptory instruction on the element of serious injury, but gave the following instruction concerning the “deadly weapon” element of the charge:

[T]hat the defendant used a deadly weapon. A deadly weapon is a weapon which is likely to cause death or serious bodily injury. In determining whether a two by four board was a deadly weapon,

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you should consider the nature of a two by four board, the manner in which i[t] was used, and the size and strength of the defendant as compared to the victim.

The jury returned a verdict of guilty of assault with a deadly weapon inflicting serious injury. Defendant was sentenced to a term of thirty-four to fifty months' imprisonment. Defendant appeals.

In his first argument, defendant contends that the trial court erred in refusing to instruct the jury on the lesser-included offense of misdemeanor assault inflicting serious injury. We agree.

Misdemeanor assault inflicting serious injury is a lesser included offense of assault with a deadly weapon inflicting serious injury. *State v. Lowe*, 150 N.C. App. 682, 685, 564 S.E.2d 313, 315 (2002).

The primary distinction between felonious assault under G.S. § 14-32 and misdemeanor assault under G.S. § 14-33 is that a conviction of felonious assault requires a showing that a deadly weapon was used *and* serious injury resulted, while if the evidence shows that only one of the two elements was present, i.e., that *either* a deadly weapon was used *or* serious injury resulted, the offense is punishable only as a misdemeanor.

Id., 564 S.E.2d at 316 (quoting *State v. Owens*, 65 N.C. App. 107, 110-11, 308 S.E.2d 494, 498) (1983). In *Lowe*, the victim was severely beaten and testified at trial that "he was hit and 'stomped' and probably beaten with the lid of the commode[.]" *Id.* at 684, 564 S.E.2d at 315. The trial court did not instruct the jury on misdemeanor assault inflicting serious injury. *Id.* Since the defendant failed to preserve the issue at trial, this Court reviewed the issue on a "plain error" standard. *Id.* at 685, 564 S.E.2d at 315. Finding that there was no "conclusive evidence" that a deadly weapon was used, this Court reversed the conviction. *Id.* at 685, 687, 564 S.E.2d at 316-17.

In order for the State to prove assault with a deadly weapon inflicting serious injury, it had to prove that a deadly weapon was used. In *State v. Whitaker*, 316 N.C. 515, 342 S.E.2d 514 (1986), our Supreme Court stated:

When any evidence presented at trial would permit the jury to convict defendant of the lesser included offense, the trial court must instruct the jury regarding that lesser included offense. Failure to so instruct the jury constitutes reversible error not cured by a verdict of guilty of the offense charged.

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Id. at 520, 342 S.E.2d at 518 (internal citations omitted). A “defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.” *Keeble v. United States*, 412 U.S. 205, 208, 36 L.E.2d 844, 847 (1973). “The trial court may refrain from submitting the lesser offense to the jury only where the ‘evidence is clear and positive as to each element of the offense charged’ and no evidence supports a lesser-included offense.” *State v. Lawrence*, 352 N.C. 1, 19, 530 S.E.2d 807, 819 (2000) (quoting *State v. Peacock*, 313 N.C. 554, 558, 330 S.E.2d 190, 193 (1985)). “The determining factor is the presence of evidence to support a conviction of the lesser included offense.” *State v. Boykin*, 310 N.C. 118, 121, 310 S.E.2d 315, 317 (1984).

In *State v. Palmer*, 293 N.C. 633, 634, 239 S.E.2d 406, 407 (1977), the indictment charged that the defendant used “a stick, a deadly weapon[.]” At trial, the State’s evidence tended to show that there were two assaults, one in which the defendant caused minor injury to the victim’s arms by hitting him with a stick, and another where the defendant used no implement but beat the victim in the head, causing loss of ten teeth and severe bruising. *Id.* at 640-41, 239 S.E.2d at 411. The Supreme Court held that, as the stick was not a deadly weapon as a matter of law, the trial court’s failure to instruct the jury on the lesser-included offense of simple assault was reversible error. *Id.* at 642-44, 239 S.E.2d at 412-13; accord *State v. Smith*, 186 N.C. App. 57, 650 S.E.2d 29 (2007).

Citing to the 1924 case *State v. Smith*, the Supreme Court clearly enunciated the test for when a jury must determine whether an object is a “deadly weapon.”

“ ‘Where the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether or not it is deadly within the foregoing definition is one of law, and the Court must take the responsibility of so declaring. . . . But where it may or may not be likely to produce fatal results, according to the manner of its use, or the part of the body at which the blow is aimed, its alleged deadly character is one of fact to be determined by the jury.’ (Citation omitted.)”

If there is a conflict in the evidence regarding either the nature of the weapon or the manner of its use, with some of the evidence tending to show that the weapon used or as used would not likely

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produce death or great bodily harm and other evidence tending to show the contrary, the jury must, of course, resolve the conflict.

Palmer, 293 N.C. at 643, 239 S.E.2d at 413 (quoting *State v. Smith*, 187 N.C. 469, 470, 121 S.E. 737 (1924)).

In the instant case, the trial judge correctly concluded that the issue of whether or not the “2x4 board” was a deadly weapon was one for the jury to determine, and did not give a peremptory instruction on that element of the assault charge. Having made the determination that the “2x4 board” was not *per se* a deadly weapon, the trial judge should have instructed the jury on the lesser included offense of assault inflicting serious injury. We hold that this omission constitutes reversible error, and this matter must be remanded for a new trial.

In light of our decision, we decline to address defendant’s remaining assignments of error.

NEW TRIAL.

Judges ELMORE and STROUD concur.

IN THE MATTER OF: T.M.H.

No. COA07-609

(Filed 16 October 2007)

1. Termination of Parental Rights— subject matter jurisdiction—verified petition

The trial court had subject matter jurisdiction in a termination of parental rights case even though the verified petition failed to contain all of the information required by N.C.G.S. § 7B-1104, because: (1) the father asserted no prejudice arising from the alleged omissions, and none was found; and (2) the record as a whole disclosed the father had access to all of the information required by the statute, and the petition was substantially compliant on its face.

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[186 N.C. App. 451 (2007)]

2. Termination of Parental Rights— sufficiency of findings of fact—willfulness

The trial court erred in a termination of parental rights case by failing to make specific findings of fact or to state in its conclusions of law that the father's actions were willful, and the case is remanded to the trial court to make appropriate findings as to willfulness and, if appropriate, to articulate conclusions of law including grounds under N.C.G.S. § 7B-1111(a) forming the basis for termination. The trial court may, in its discretion, receive additional evidence on remand.

Appeal by respondent father from order entered 27 February 2007 by Judge A. Elizabeth Keever in Cumberland County District Court. Heard in the Court of Appeals 4 September 2007.

Robert E. Ewing, for respondent-appellant.

Hedahl and Radtke Famly Law Center, by Debra J. Radke, for petitioner-appellee.

STEELMAN, Judge.

Where the trial court failed to make findings of fact and conclusions of law concerning the willfulness of respondent's conduct, the order of the trial court must be vacated and remanded for further findings.

On 23 January 2006, mother filed a petition to terminate father's parental rights to T.M.H. The verified petition alleged that the father had failed to pay reasonable support or have any contact with the minor child for a continuous period of more than six months and failed to acknowledge birthdays, Christmas, or other holidays. The petition further alleged that mother was a resident of Cumberland County, North Carolina, and that respondent was the biological father of the child and a resident of Nash County, North Carolina. On 24 January 2006, a summons issued. In an answer filed 4 October 2006, respondent admitted his paternity of the minor child and his residency in North Carolina but denied petitioner's substantive allegations regarding the grounds for termination.

After a two-day hearing in December 2006, the trial court ordered that father's parental rights be terminated. On 27 February 2007, the court entered a written order reflecting, in relevant part, the following findings of fact:

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8. That the court finds by clear, cogent and convincing evidence that [T.B. and T.H.] are the parents of . . . T.M.H. born . . . in Nash County

. . . .

13. . . . [T]hat after [May 2001] father had little or no[] contact with the minor child.

. . . .

15. That the . . . father did not attempt to exercise [Christmas] visitation with [the paternal grandparents].

16. That the father left Nash County [to live] in the Charlotte/Concord area thereafter and continues to reside there at this time.

17. That subsequent to the entry of the child support order in 1998, the father paid . . . child support of approximately \$1000.00 in 1999, approximately \$1000.00 in 2000, \$400.00 in 2004, \$30.00 in 2005 and \$1000.00 in 2006.

18. That much of the payment for . . . child support [was made] in order to avoid being placed in jail for . . . failure to comply.

19. That [the father] testified . . . that he had the ability to pay child support during that period of time but chose not to since he was not visit[ing] with the minor child during that period.

20. That the father did not take the action necessary to enforce [his previously-entered] visitation order

21. That [the father] made no real effort to maintain contact with . . . the minor child following the year 2001.

. . . .

24. That the father has not maintained a relationship with the minor child and the child knows the step father a[s] the emotional and father [sic] in his life.

25. That the father ha[s], in fact, abandoned the minor child.

26. That the father failed to pay adequate child support for the minor child although he had the ability to do so.

The order reflected the following two conclusions of law:

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1. That there are grounds for termination of [father's] parental rights.
2. That it is in the child's best interest that [father's] parental rights be terminated.

Father filed timely notice of appeal from the termination order.

I. Jurisdictional Challenge

[1] In his first argument, father contends that, because the petition failed to comply with N.C.G.S. § 7B-1104, the trial court was without subject matter jurisdiction over the case. We disagree.

N.C.G.S. § 7B-1104 (2005) requires a verified petition to include: (1) the child's name, date and place of birth, as well as county of current residence; (2) petitioner's name and address, and status upon which she is authorized to file such a petition; (3) name and address of both parents; (4) facts sufficient to warrant a determination that one or more grounds exist for terminating parental rights; and (5) a statement that the petition has not been filed to circumvent the Uniform Child-Custody Jurisdiction and Enforcement Act.

Only a violation of the verification requirement of N.C.G.S. § 7B-1104 has been held to be a jurisdictional defect *per se*. *In re Triscari Children*, 109 N.C. App. 285, 287-88, 426 S.E.2d 435, 436 (1993) (applying former N.C.G.S. § 7A-289.25); *see also In re T.R.P.*, 360 N.C. 588, 593-94, 636 S.E.2d 787, 792 (2006).

Father's reliance on *In re Z.T.B.*, 170 N.C. App. 564, 613 S.E.2d 298 (2005) is misplaced. Although this Court held that the failure of the petitioner to set forth the information required by N.C.G.S. § 7B-1104 was reversible error, even absent a showing of prejudice, the decision was grounded in the Court's inability to follow the trial court's reasoning for its conclusions. *Id.* at 569-70, 613 S.E.2d at 301. The opinion distinguished the case from *In re Humphrey*, 156 N.C. App. 533, 577 S.E.2d 421 (2003) (requiring a showing of prejudice) as follows:

In *Humphrey*, this Court had all the facts available to it for review. . . . *Humphrey* is further distinguishable in that the defect in the petition in that case could be overcome by information contained on the face of the petition itself.

In re Z.T.B., 170 N.C. App. at 569-70, 613 S.E.2d at 301.

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We find the petition filed in this cause sufficient to confer jurisdiction on the district court. Father asserts no prejudice arising from the alleged omissions, and we find none. The record as a whole discloses that father had access to all of the information required by the statute, and the petition was substantially compliant on its face.

This argument is without merit.

III. Appellate Review

[2] In his second argument, father contends that, because the trial court failed to make specific findings of fact or to state in its conclusions of law that the father's actions were willful, the findings do not conclusively establish grounds for termination of parental rights. We agree.

This Court is bound by its prior decisions encompassing the same legal issue. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36-37 (1989). In *In re D.R.B.*, 182 N.C. App. 733, 643 S.E.2d 77 (2007), this Court vacated a judgment that failed to articulate the specific grounds for termination, stating:

For this Court to exercise its appellate function, the trial court must enter sufficient findings of fact and conclusions of law to reveal the reasoning which led to the court's ultimate decision.

Id., 182 N.C. App. at 736, 643 S.E.2d at 79 (citing *Coble v. Coble*, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980)). "Without an identified basis for the court's adjudication under [N.C.G.S.] § 7B-1109(e), we cannot effectively review the termination order." *Id.*, 182 N.C. App. at 737-38, 643 S.E.2d at 80.

Although the trial court's conclusions of law fail to identify which statutory grounds the court relied upon in terminating parental rights, petitioner suggests that there were two grounds: (1) failure to provide support under N.C.G.S. § 7B-1111(a)(4); and (2) abandonment under N.C.G.S. § 7B-1111(a)(7). One of the required elements that petitioner must demonstrate to establish each of these grounds is that respondent's conduct was "willful." The order before us contains no findings of willfulness. In the absence of a finding of willfulness, the trial court's order does not establish grounds for termination. *See id.*; *In re Matherly*, 149 N.C. App. 452, 455, 562 S.E.2d 15, 18 (2002).

We further note that the termination order was printed, signed, and filed on the ruled stationery of petitioner's trial attorney. It is important that our trial courts not only be impartial, but also have

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every appearance of impartiality. We strongly discourage judges from signing orders prepared on stationery bearing the name of any law firm.

We vacate the order and remand the matter to the trial court with instructions to make appropriate findings as to the willfulness of father's conduct, and then, if appropriate, to articulate conclusions of law that include the grounds under N.C.G.S. § 7B-1111(a) which form the basis for termination. The trial court may, in its discretion, receive additional evidence on remand. *See Heath v. Heath*, 132 N.C. App. 36, 38, 509 S.E.2d 804, 805 (1999). In light of our decision, we decline to address respondent's remaining assignments of error.

AFFIRMED IN PART.

VACATED AND REMANDED IN PART.

Judges JACKSON and STROUD concur.

CHARLIE CASPER, RICHARD LESSARD AND M. KATHLEEN LESSARD, WILLIAM MURRAY AND MARY MURRAY, JEFFREY SCHEURING AND MARIE SCHEURING, WILLIAM B. SUTTON AND ANNETTE SUTTON, PETITIONERS v. CHATHAM COUNTY AND THE CHATHAM COUNTY COMMISSIONERS, RESPONDENTS; JESSE FEARRINGTON, EARL THOMAS, DR. LESLIE YOW AND THE MOUNT PLEASANT UNITED METHODIST CHURCH BOARD OF TRUSTEES, INTERVENOR-RESPONDENTS

No. COA07-271

(Filed 16 October 2007)

1. Zoning— conditional use permit—standing—special damages required

The trial court correctly concluded that petitioners lacked standing to challenge a conditional use permit where they did not allege special damages distinct from the rest of the community. They alleged only that they own property abutting or near the property which is the subject matter of the permit.

2. Zoning— conditional use permit—standing

The question of whether the issuance of a conditional use permit was supported by the evidence was not considered where the plaintiffs lacked standing.

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[186 N.C. App. 456 (2007)]

Appeal by petitioners from judgment and order entered 14 November 2006 by Judge Orlando F. Hudson, Jr. in Superior Court, Chatham County. Heard in the Court of Appeals 18 September 2007.

Northen Blue, LLP, by David M. Rooks, III, for plaintiffs-appellants.

Bradshaw & Robinson, LLP, by Nicolas P. Robinson, for intervenor-respondents.

WYNN, Judge.

To appeal the grant of a conditional use permit, a party must allege in his petition how the value or enjoyment of his land has been or will be adversely affected and prove that he will sustain a pecuniary loss.¹ Here, because Petitioners failed to allege special damages in their petition, we affirm.

Respondents Jesse Fearington and Earl Thomas seek to develop property in Chatham County that they own or have contracted to buy from Respondents Leslie Yow and the Mount Pleasant United Methodist Church. On 17 April 2006, Fearington filed an application for a conditional use district and a conditional use permit for a 29.6 acre specialty retail site known as “Fearington Place,” to be developed on U.S. 15-501 and Morris Road in Chatham County.

On 15 May 2006, the Chatham County Board of Commissioners held separate public hearings for the requested conditional use district and conditional use permit. Petitioners, neighboring property owners to the proposed development, appeared at the hearing and argued against the issuance of the conditional use permit. On 11 July 2007, the Chatham County Planning Board recommended approval of the proposed conditional use district and the conditional use permit.

On 17 July 2006, the Board of Commissioners agreed with the advisory Planning Board that the proposed conditional use district and conditional use permit were in conformity with the Land Use Plan and met the five required findings under the Chatham County Zoning Ordinance. Accordingly, the Board of Commissioners adopted an Ordinance Amending the Zoning Ordinance of Chatham County and approved Fearington’s requested conditional use permit.

Pursuant to N.C. Gen. Stat. § 153A-345(e) (2005), Petitioners filed a Petition for Writ of Certiorari on 25 July 2006, seeking review of the

1. *Kentallen, Inc. v. Hillsborough*, 110 N.C. App. 767, 769, 4331 S.E.2d 231, 232 (1993).

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Board of Commissioner's decision to grant the conditional use permit. On 14 November 2006, the trial court dismissed the petition on the basis that Petitioners lacked standing and affirmed the decision of the Board of Commissioners.

Petitioners appeal to this Court contending that the trial court erred by: (I) dismissing the petition for writ of certiorari and (II) concluding that the Board of Commissioners grant of the conditional use permit was supported by substantial, material, and competent evidence in the record.²

I.

[1] Petitioners first argue that the trial court erred by dismissing their petition on the grounds that Petitioners failed to allege special damages and therefore lacked standing to challenge the grant of the conditional use permit. We disagree.

Our General Statutes provide that any person aggrieved by the granting of a special use permit or conditional use permit may appeal.³ See N.C. Gen. Stat. § 153A-340(c1) (2005) (providing that "the board of adjustment, the planning board, or the board of commissioners may issue special use permits or conditional use permits"); N.C. Gen. Stat. § 153A-345(b) (2005) ("Any person aggrieved . . . may take an appeal."). However, to be considered an "aggrieved person" and thus have standing to seek review, a party must claim special damages, distinct from the rest of the community. *Sarda v. City/Cty. of Durham Bd. of Adjust.*, 156 N.C. App. 213, 214, 575 S.E.2d 829, 830-31 (2003). "Special damages are defined as a reduction in the value of his [petitioner's] own property." *Id.* at 215, 575 S.E.2d at 831 (internal citation omitted). Additionally,

[n]ot only is it the petitioner's burden to prove that he will sustain a pecuniary loss, but he must also allege the facts on which [the] claim of aggrievement is based Once the petitioner's aggrieved status is properly put in issue, the trial court must,

2. The attorney for Chatham County and the Chatham County Commissioners filed a motion giving notice of the County's intention not to defend the judgment on appeal, and the court allowed the County attorney to withdraw by order entered 15 February 2007.

3. Our Supreme Court has noted that "[a]s the statute implies, the terms 'special use' and 'conditional use' are used interchangeably . . . and a conditional use or a special use permit 'is one issued for a use which the ordinance expressly permits in a designated zone upon proof that certain facts and conditions detailed in the ordinance exist.'" *Coastal Ready-Mix Concrete co. v. Bd. of Comm'rs*, 299 N.C. 620, 623, 265 S.E.2d 379, 381 (1980) (internal citation omitted).

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based on the evidence presented, determine whether an injury has resulted or will result from [the] zoning action.

Kentallen, Inc. v. Hillsborough, 110 N.C. App. 767, 769, 431 S.E.2d 231, 232 (1993) (internal citations and quotations omitted).

To have standing to seek review of the granting of a conditional use permit, a petitioner must first allege “the manner in which the value or enjoyment of [petitioner’s] land has been or will be adversely affected.” *Id.* (citation omitted). We have held that “[e]xamples of adequate pleadings include allegations that the rezoning would cut off the light and air to the petitioner’s property, increase the danger of fire, increase the traffic congestion and increase the noise level.” *Id.* at 769-70, 431 S.E.2d at 232. However, the “mere averment that [petitioners] own land in the immediate vicinity of the property for which the special use permit is sought, absent any allegation of special damages . . . in their Petition, is insufficient to confer standing upon them.” *Sarda*, 156 N.C. App. at 215, 575 S.E.2d at 831 (quotation omitted) (citing *Lloyd v. Town of Chapel Hill*, 127 N.C. App. 347, 351, 489 S.E.2d 898, 900 (1997)); *Kentallen*, 110 N.C. App. at 770, 431 S.E.2d at 233 (holding that petitioner’s allegation that it is the “owner of adjoining property” does not satisfy the pleading requirement).

In this case, Petitioners alleged in their petition only that they “own property either abutting or near the property which is the subject matter of the re-zoning and conditional use permit.” Because Petitioners failed to allege any damages whatsoever, much less any special damages, the trial court correctly concluded that Petitioners lacked standing. Accordingly, we affirm.

II.

[2] Petitioners next contend that the trial court erred by concluding that the decision of the Board of Commissioners granting the conditional use permit was supported by substantial, material, and competent evidence in the record as a whole. Having found Petitioners lack standing, we will not consider this issue.

It is well established that “[i]n any case or controversy before the North Carolina courts, subject matter jurisdiction exists only if a plaintiff has standing.” *Sarda*, 156 N.C. App. at 215, 575 S.E.2d at 831 (quoting *Peacock v. Shinn*, 139 N.C. App. 487, 491, 533 S.E.2d 842, 845, *rev. denied*, 353 N.C. 267, 546 S.E.2d 110 (2000)). “If a court finds at any stage of the proceedings that it lacks jurisdiction over the subject matter of a case, it must dismiss the case for want of jurisdic-

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[186 N.C. App. 460 (2007)]

tion.” *Id.* (citing *State v. Linemann*, 135 N.C. App. 734, 739, 522 S.E.2d 781, 785 (1999)) (internal quotation omitted). Accordingly, we dismiss this assignment of error.

Affirmed in part, dismissed in part.

Judges HUNTER and JACKSON concur.

IN THE MATTER OF: THE ESTATE OF FRANK STEPHEN POTTS

No. COA07-195

(Filed 16 October 2007)

Intestate Succession— establishing parentage—voluntary child support agreement

The trial court did not err by concluding that decedent’s voluntary child support agreement was sufficient to establish his parentage of petitioner entitling petitioner to inherit from decedent under N.C.G.S. § 29-19(b)(2) through intestate succession, because: (1) N.C.G.S. § 29-19(b) does not place any limitations on the type of written instrument which must be filed with the clerk of superior court; (2) the requirements of the statute are that the father of the child must acknowledge himself to be the father of the child in a written instrument, execute the instrument or acknowledge parentage before a certifying officer named in N.C.G.S. § 52-10(b), and file the instrument during the lifetime of both the father and child in the superior court of the county in which either reside; and (3) the pertinent voluntary support agreement stated the decedent acknowledged he was the parent of the child, it was executed before a notary, and it was approved and signed by a district court judge and filed with the clerk of superior court in the county where decedent had lived and died.

Appeal by respondents from an order dated 24 October 2006 by Judge Dennis J. Winner in Macon County Superior Court. Heard in the Court of Appeals 13 September 2007.

Creighton W. Sossomon for respondent-appellants.

Adams Hendon Carson Crow & Saenger, P.A., by George W. Saenger, for petitioner-appellee.

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[186 N.C. App. 460 (2007)]

BRYANT, Judge.

William Terry Potts and Vella Mae Potts (collectively respondents) appeal from the trial court's order dated 24 October 2006 affirming the order of the Clerk of Superior Court holding Arthur Scott Reynolds (petitioner) was the child and sole heir of Frank Stephen Potts (Potts). For the reasons stated herein, we affirm the order of the trial court.

Facts and Procedural History

Petitioner was born out of wedlock to Potts and Marni Rose Reynolds on 8 April 1989. On 13 April 2004, Potts executed a Voluntary Support Agreement and Order and, on 15 April 2004, an Affidavit of Parentage For Child Born Out of Wedlock. On 15 April 2004, the presiding district court judge approved and signed the voluntary support agreement, thereby according it the "same force and effect" as an order of the court. N.C. Gen. Stat. § 110-132(a) (2005). The voluntary support order was filed the same day, and contains the date and time stamp of the Macon County Clerk of Superior Court. A copy of the affidavit of parentage was filed together with the support order, but it was not separately clocked in, and therefore does not contain a date and time stamp of the Clerk of Superior Court for Macon County.

On 2 September 2004, Potts executed a document naming respondent William Terry Potts as executor of his estate. However, Potts did not provide for the distribution of his assets in the testamentary document and, upon Potts' death on 19 January 2005, distribution of his estate was to be determined by the intestate laws of the State of North Carolina. Potts is survived by petitioner (his child), and respondents (his brother and mother).

On 24 March 2006, petitioner's mother filed on his behalf a complaint seeking the removal of respondent William Potts as the executor of Potts' estate and the establishment of petitioner as Potts' sole heir. Respondents filed their response on 26 April 2006 and petitioner filed a Notice of Claim pursuant to N.C. Gen. Stat. § 29-19 on 17 May 2006.

A hearing on this matter was held before the Clerk of Court on 18 May 2006, and the Clerk determined petitioner to be the sole heir of Potts and entitled to take his net estate. Respondents appealed to the Superior Court of Macon County. In an order dated 24 October

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2006, the Superior Court affirmed the judgment of the Clerk. Respondents appeal.

The dispositive issue respondents present to this Court on appeal is whether the trial court erred in concluding that Potts' voluntary child support agreement is sufficient to establish his parentage of petitioner entitling petitioner to inherit from Potts pursuant to N.C. Gen. Stat. § 29-19(b)(2). Respondents argue, pursuant to N.C. Gen. Stat. § 110-132, that a voluntary support agreement is self-limiting and cannot qualify as a written instrument capable of creating inheritance rights through N.C. Gen. Stat. § 29-19(b)(2). N.C. Gen. Stat. § 110-132 states voluntary support agreements "shall have the same force and effect as an order of support entered by that court[.]" N.C. Gen. Stat. § 110-132(a) (2005). However, this language does not imply voluntary support agreements are strictly limited such that they may have no legal implications other than that of child support, as respondents assert; it acknowledges that voluntary support agreements, when properly acknowledged and approved by a trial court, have the same force and effect as a trial court's order of support.

For the purposes of intestate succession, an illegitimate child is entitled to take from:

Any person who has acknowledged himself during his own lifetime and the child's lifetime to be the father of such child in a written instrument executed or acknowledged before a certifying officer named in G.S. 52-10(b) and filed during his own lifetime and the child's lifetime in the office of the clerk of superior court of the county where either he or the child resides.

N.C. Gen. Stat. § 29-19(b)(2) (2005). It is well settled that,

[w]hen construing statutes, this Court first determines whether the statutory language is clear and unambiguous. If the statute is clear and unambiguous, we will apply the plain meaning of the words, with no need to resort to judicial construction. However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment.

Wiggs v. Edgecombe County, 361 N.C. 318, 322, 643 S.E.2d 904, 907 (2007) (internal citations and quotations omitted).

The language of N.C. Gen. Stat. § 29-19(b) is clear and unambiguous and, on its face, the statute does not place any limitations on the

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type of written instrument which must be filed with the Clerk of Superior Court. To meet the requirements imposed by this statute, the father of the child must:

- (1) acknowledge himself to be the father of the child in a written instrument;
- (2) execute the instrument or acknowledge parentage before a certifying officer named in N.C. Gen. Stat. § 52-10(b); and
- (3) file the instrument during the lifetime of both the father and child in the superior court of the county in which either reside.

N.C. Gen. Stat. § 29-19(b)(2) (2005); *see also In re Estate of Morris*, 123 N.C. App. 264, 472 S.E.2d 786 (1996).

In the case at hand, Potts' voluntary support agreement states, "I hereby acknowledge that I am the parent of the child(ren) named below" Petitioner is the child named in Potts' voluntary support agreement. Potts' voluntary support agreement was executed before a notary, which is a certifying officer named in N.C. Gen. Stat. § 52-10(b) (2005) ("Such certifying officer shall be a notary public . . ."). The voluntary support agreement was approved and signed by a district court judge and filed with the Clerk of Superior Court in Macon County, North Carolina, on 15 April 2004. Potts lived in the town of Highlands located in Macon County, North Carolina, and died on 19 January 2005. Petitioner is still living.

As found by the trial court, Potts' voluntary support agreement meets the requirements of N.C. Gen. Stat. § 29-19(b)(2) and petitioner is entitled, for the purposes of intestate succession, to take by, through and from decedent Frank Stephen Potts. Respondents' assignments of error are overruled.

Affirmed.

Judges STEELMAN and GEER concur.

CARTER v. HILL

[186 N.C. App. 464 (2007)]

NORMAN CARTER AND SOPHY CARTER, PLAINTIFFS v. JAMIE HILL AKA (FRANK HILL) AND STACY HILL, DEFENDANTS

No. COA06-1517

(Filed 16 October 2007)

1. Contempt— civil contempt—no underlying order or judgment—failure to give adequate notice—failure to make appropriate findings of fact

The trial court erred by holding defendants in civil contempt for failure to pay \$2,480 in a summary ejectment case, because: (1) the contempt order was not based on any underlying order or judgment since no judgment was reduced to writing as required by N.C.G.S. § 1A-1, Rule 58; (2) even if the trial court's underlying judgment had been properly entered, defendants had not been given adequate notice of the contempt proceeding when defendants were notified at the end of trial that they would be held in contempt until the debt was paid and they were taken immediately to jail with no good cause shown in violation of N.C.G.S. § 5A-23(a); and (3) the trial court failed to make the appropriate findings of fact including willfulness and the ability to comply, and to the contrary the court found defendants were not able to pay the court ordered amount.

2. Appeal and Error— appealability—outside scope of order

Although defendant's remaining arguments concern errors that allegedly occurred during trial relating to the admission of evidence and rulings on defendants' defenses and counterclaims, these assignments of error are dismissed because: (1) they are not properly before the Court of Appeals since they are outside the scope of the order being appealed; and (2) the notice of appeal references the order entered on 6 September 2006 which found defendant in civil contempt, and thus defendants have properly appealed only from the court's determination of civil contempt.

Appeal by defendants from order entered 6 September 2006 by Judge Victoria Roemer in Forsyth County District Court. Heard in the Court of Appeals 20 August 2007.

No brief filed for plaintiffs-appellees.

Legal Aid of North Carolina, Inc., by Jamiah Waterman, Liza Baron, and Will Corbett, for defendants-appellants.

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[186 N.C. App. 464 (2007)]

MARTIN, Chief Judge.

On 21 July 2006 plaintiffs filed a Complaint in Summary Ejectment against defendants, alleging that defendants failed to pay \$990 in rent and owed \$500 for damage to plaintiffs' property. The magistrate found that defendants owed \$840 in past-due rent but also that plaintiffs had breached the warranty of habitability and owed defendants \$175 per month rent abatement for the fourteen months defendants lived in the house. Defendants appealed the magistrate's judgment to the district court and filed an Answer and Counterclaims in response to the Complaint for Summary Ejectment.

Upon trial *de novo*, the parties appeared *pro se*. The evidence tended to show plaintiffs agreed to lease a home to defendants for one year, beginning 1 May 2005, at a rent of \$575 per month. When defendants moved into the home, they found leaking pipes, flooding in the basement, excessive water bills, slow drains, broken doors, and unfinished walls. Despite defendants' numerous requests to plaintiffs, no repairs were made. During the fourteen months that defendants lived in the house, they paid \$6,125 in rent. After defendants rested their case, the trial court entered, in open court, an oral judgment for plaintiffs in the amount of \$2,480 and made no rulings on defendants' counterclaims. The judge *sua sponte* notified defendants that they would be held in civil contempt of court until they paid \$2,480 to plaintiffs. Defendants were held in jail until later that day when they were able to pay the amount. According to the record before this Court, at the end of trial, the trial court entered only an Order of Commitment upon finding defendants "in Civil contempt . . . due to the following: Defendants not able to pay the Court Ordered \$2480.00" and entered no other order or judgment. Defendants appeal from the order finding them in contempt.

[1] Defendants contend that the trial court erred in holding them in civil contempt because the contempt order is not based on any underlying order or judgment, it was made after a hearing without proper notice to defendants, and it was not based upon proper findings. On all of these points, we agree.

N.C.G.S. § 5A-21 defines civil contempt as "[f]ailure to comply with an order of a court." The trial court purported to conform to this definition where it based its finding of contempt upon defendants' inability to pay "the Court Ordered \$2480.00." An examination of the record, however, reveals that the court had not ordered that amount

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because no judgment was entered. “[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court.” N.C. Gen. Stat. § 1A-1, Rule 58 (2005). Since no judgment was reduced to writing, defendants could not have failed to comply with an order of the court to pay \$2,480 at the time the trial court found defendants in civil contempt.

Even if the trial court’s underlying judgment had been properly entered, the trial court still erred in finding defendants in civil contempt when they had not been given adequate notice of the contempt proceeding.

Proceedings for civil contempt are by motion [of an aggrieved party], by the order of a judicial official directing the alleged contemnor to appear at a specified reasonable time and show cause why he should not be held in civil contempt, or by the notice of a judicial official that the alleged contemnor will be held in contempt unless he appears at a specified reasonable time and shows cause why he should not be held in contempt. *The order or notice must be given at least five days in advance of the hearing unless good cause is shown.*

N.C. Gen. Stat. § 5A-23(a) (2005) (emphasis added). In the case before us, defendants were notified at the end of the trial that they would be held in contempt until the debt was paid, and they were taken immediately to jail. No good cause was shown. Therefore, the hearing was clearly in violation of N.C.G.S. § 5A-23(a).

In absence of the preceding two defects, the court also erred by failing to make appropriate findings of fact to support the entry of a civil contempt order. “If civil contempt is found, the judicial official must enter an order finding the facts constituting contempt and specifying the action which the contemnor must take to purge himself or herself of the contempt.” N.C. Gen. Stat. § 5A-23(e) (2005). Failure to comply with an order of the court is civil contempt only when the noncompliance is willful and “[t]he person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.” N.C. Gen. Stat. § 5A-21(2a)-(3) (2005). Findings of fact on these particular elements are conspicuously absent from the trial court’s contempt order in this case. Quite to the contrary, the court found “Defendants *not* able to pay the Court Ordered \$2480.00.” (emphasis added).

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Each of the errors we have discussed would alone be sufficient to reverse the trial court's entry of the contempt order. Because we reverse the trial court on this issue, we need not consider defendants' next arguments that the entry of the contempt order violated the prohibition against debtors' prison in Article 1, § 28, of the North Carolina Constitution, violated their rights to exempt property from execution as provided in Article X, § 1, of the North Carolina Constitution, and that the order deprived defendants of their property without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

[2] Defendants' remaining arguments concern errors that occurred during trial, related to the admission of evidence and rulings on defendants' defenses and counterclaims. These errors are not properly before us because they are outside the scope of the order being appealed in this case. "Any party entitled by law to appeal *from a judgment or order* of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal" N.C. R. App. P. 3(a) (2006) (emphasis added). The notice of appeal in the case before us references "the order entered on September 6, 2006, in the District Court of Forsyth County, which found Defendants to be in civil contempt, and committed them to confinement until they paid \$2,480 to Plaintiffs." Thus, defendants have properly appealed only from the court's determination of civil contempt.

Reversed.

Judges McCULLOUGH and TYSON concur.

STATE OF NORTH CAROLINA v. WAIL BAKRI, DEFENDANT AND HARCO NATIONAL
INSURANCE COMPANY, SURETY

No. COA06-1331

(Filed 16 October 2007)

**1. Bail and Pretrial Release— findings—surety's offer to pay
for extradition**

The trial court addressed the facts as required by N.C.G.S. § 1A-1, Rule 52 in a case in which a bail bond surety moved for relief from forfeit of the bond. A finding by the court concerning

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the surety's offer to pay for the extradition of a defendant encompassed the facts which the surety alleged the court had ignored.

2. Bail and Pretrial Release— bail bond—surety's motion to have bond repaid—denial not an abuse of discretion

The trial court did not abuse its discretion by denying a surety's motion to have a forfeited bond repaid. It is uncontested that there was a final judgment of forfeiture, and merely offering to pay for extradition hardly constitutes the extraordinary circumstances required for remission of the bond.

Appeal by surety from order entered 11 May 2006 by Judge Knox V. Jenkins in Johnston County Superior Court. Heard in the Court of Appeals 9 May 2007.

Daughtry, Woodard, Lawrence & Starling, by James R. Lawrence, Jr., and Woodruff, Reece & Fortner, by Gordon C. Woodruff and Michael J. Reece, for the Johnston County Board of Education.

Andresen & Associates, by Kenneth P. Andresen, for surety.

ELMORE, Judge.

On 21 January 2004, Wail Bakri (defendant) was charged with two counts of trafficking in methamphetamine. He posted a \$100,000.00 bond, on which Harco National Insurance Company (the surety) acted as surety. Defendant failed to appear for his court date and the bond was therefore forfeited. The forfeiture became final on 15 January 2005.

The surety began a search for defendant, eventually locating him in Florida in November, 2005. The surety's recovery agent requested the local authorities' assistance in apprehending defendant, and on 18 November 2005, the Volusia County Sheriff's Office arrested defendant. However, because defendant had no outstanding North Carolina warrants in the National Crime Information Center (NCIC) database, the Volusia County officials transported defendant to New Jersey, where he did have outstanding warrants. Tim Fitzpatrick, the surety's recovery manager, contacted Ann Kirby, an Assistant District Attorney for Johnston County, and requested that she arrange for defendant's extradition from New Jersey. Although the surety agreed to pay the costs of the extradition, no funds were ever presented to Johnston County.

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The Johnston County District Attorney's Office never instituted extradition proceedings, and defendant was eventually sentenced to seven years in New Jersey State prison.

On 17 March 2006, the surety filed a motion for relief from judgment, seeking to have its bond repaid. On 11 May 2006, the trial court entered an order denying the surety's motion. It is from this order that the surety now appeals.

[1] The surety first contends that the trial court's failure to include certain facts in its findings of fact violated Rule 52 of our Rules of Civil Procedure. We disagree.

Rule 52(a) states, in pertinent part:

(a) *Findings.*—

(1) In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.

(3) If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein.

N.C. Gen. Stat. § 1A-1, Rule 52 (2005).

In its brief, the surety specifically claims that the trial court "ignored" Fitzpatrick's testimony and affidavit, which stated that Kirby agreed that she would extradite defendant if the surety paid for it and that the surety then agreed to do so. However, in its finding of fact no. 15, the trial court stated, "Timothy Fitzpatrick offered to pay for the extradition of the defendant but no monies were ever tendered to the District Attorney's Office or any other arrangements made for the extradition." We hold that this finding of fact encompasses the facts that the surety alleges the trial court "ignored."

Likewise, the surety's claim that the trial court "ignored" Kirby's testimony is without merit. The surety takes pains to establish that according to Kirby's notes, she and the surety agreed that "surety will pay for extradition." Again, we hold that the trial court did, in fact, address these facts. As we have noted, the trial court specifically stated that despite the alleged agreement as to which party would pay for the extradition, no monies were tendered. Additionally, the trial

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court found that despite Kirby's notes, she felt that she did not have a duty to enter defendant's name into the system. The surety's first argument is without merit.

[2] The surety also argues that the trial court abused its discretion in denying the surety's motion because it failed to find that the District Attorney's Office breached a promise to have defendant extradited. The surety claims that this alleged breach constituted "extraordinary circumstances" as required by statute. Even were we to agree that the facts support the surety's claim of breach, this contention would be without merit.

It is uncontested that there was a final judgment of forfeiture of the bond in this case. Accordingly,

[t]he court may grant the defendant or any surety named in the judgment relief from the judgment, for the following reasons, and none other:

(1) The person seeking relief was not given notice as provided in G.S. 15A-544.4.

(2) Other extraordinary circumstances exist that the court, in its discretion, determines should entitle that person to relief.

N.C. Gen. Stat. § 15A-544.8(b) (2005). The surety assigns no error to the notice it received. It may therefore assert error only as to the trial court's discretionary finding that no extraordinary circumstances existed.

We again note that the trial court addressed the alleged agreement to extradite in its findings of fact, stating, "Timothy Fitzpatrick offered to pay for the extradition of the defendant but no monies were ever tendered to the District Attorney's Office or any other arrangements made for the extradition." It is clear to this Court that an offer to pay for the extradition, by itself, is insufficient to form an agreement. Even assuming that Kirby accepted the offer, which is not clear on the record before this Court, the trial court specifically noted that the surety did not, in fact, tender payment for the extradition. " 'Extraordinary circumstances' in the context of bond forfeiture has been defined as going beyond what is usual, regular, common, or customary . . . of, relating to, or having the nature of an occurrence or risk of a kind other than what ordinary experience or prudence would foresee." *State v. Edwards*, 172 N.C. App. 821, 825, 616 S.E.2d 634, 636 (2005) (quotations and citations omitted) (alteration in original).

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The surety took on the risk that defendant would not appear in court. He did not. Surety now seeks to transfer that risk to the State based on an alleged agreement. However, merely making an offer to pay for extradition is hardly “extraordinary.”

Equally important, we note that the surety has not assigned error to the trial court’s finding of fact no. 21, which states “[t]hat nowhere in the [surety’s] motion for relief from judgment was there any allegation of extraordinary circumstance under the statute to justify remission of [the] bond.” “Findings of fact to which no error is assigned are presumed to be supported by competent evidence and are binding on appeal.” *Pascoe v. Pascoe*, 183 N.C. App. 648, 650, 645 S.E.2d 156, 157 (2007) (quotations and citations omitted). Accordingly, we hold that the trial court did not abuse its discretion.

Having conducted a thorough review of the record, we affirm the order of the trial court.

Affirmed.

Judges HUNTER and GEER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 16 OCTOBER 2007

IN RE C.C. & B.C. No. 07-535	Cabarrus (05JA12-13)	Affirmed
IN RE J.A.C. No. 07-515	Guilford (05J280)	Affirmed
IN RE J.F. No. 07-723	Buncombe (06J307)	Affirmed
IN RE L.W. No. 07-544	Person (04J24)	Affirmed
IN RE N.D. No. 07-631	Cumberland (06JA61)	Affirmed
LESLIE v. WOODIE No. 06-1418	Alleghany (05CVS126)	No error
McLESKEY v. CAROLINA SCCS No. 06-1648	Indus. Comm. (I.C. 305698)	Affirmed
PENLAND v. PENLAND No. 07-303	Buncombe (02CVD4903)	Dismissed
STATE v. CHERRY No. 06-1384	Bertie (01CRS50603)	No error
STATE v. COMMODORE No. 07-75	Forsyth (04CRS58346-57)	No error
STATE v. DUNN No. 06-1637	Wake (05CRS106248)	No error
STATE v. GARNER No. 07-219	Alamance (05CRS56861-63) (05CRS19661)	Affirmed
STATE v. JOHNSON No. 06-1557	Mecklenburg (05CRS208288-89)	No prejudicial error
STATE v. MASSEY No. 07-55	Mecklenburg (05CRS220174)	No error
STATE v. MILLER No. 07-10	Guilford (05CRS99396) (05CRS99398-99)	No error
STATE v. MORGAN No. 07-45	Guilford (05CRS66800)	No error

STATE v. YOUNG
No. 06-1680

Granville
(05CRS52410)

Affirmed and re-
manded in part for
correction of the
order revoking
probation

STATE ex rel. NEWTON v.
SCARBOROUGH
No. 07-111

Durham
(04CVS3393)

Affirmed

SHAW v. U.S. AIRWAYS, INC.

[186 N.C. App. 474 (2007)]

CURRY SHAW, EMPLOYEE, PLAINTIFF v. U.S. AIRWAYS, INC., EMPLOYER, AMERICAN
PROTECTION INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA06-1407

(Filed 6 November 2007)

Workers' Compensation— average weekly wage—employer-funded retirement accounts

An Industrial Commission conclusion in a workers' compensation case that employer-funded contributions to plaintiff's two retirement accounts should not be included in the calculation of plaintiff's average weekly wage was reversed and remanded. Not all fringe benefits are required to be excluded from an average weekly wage calculation; moreover, the Commission did not apply the proper analysis in determining whether the contributions at issue in this case should be excluded.

Judge HUNTER dissenting.

Appeal by plaintiff from opinion and award entered 13 September 2006 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 May 2007.

The Sumwalt Law Firm, by Vernon Sumwalt and Mark T. Sumwalt, for plaintiff-appellant.

Littler Mendelson P.C., by Kimberly A. Zabroski, for defendants-appellees.

GEER, Judge.

Plaintiff Curry Shaw appeals from an opinion and award of the North Carolina Industrial Commission in which the Commission concluded that employer-funded contributions to plaintiff's two retirement accounts should not be included in the calculation of plaintiff's "average weekly wage," a term defined under N.C. Gen. Stat. § 97-2(5) (2005). Whether retirement contributions ought to be considered as part of an injured worker's average weekly wage is a question not previously considered by the North Carolina appellate courts. Because we have concluded that not all fringe benefits are required to be excluded from an average weekly wage calculation and because the Commission did not apply the proper analysis in determining whether the contributions at issue in this case should be excluded, we reverse and remand the matter to the Commission so that it may undertake the proper inquiry.

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Contrary to the suggestion in the dissenting opinion, nothing in this opinion holds that the benefits at issue in this case should be included in calculating plaintiff's average weekly wage. We leave that question for the Commission to decide after applying the test mandated by *Kirk v. N.C. Dep't of Corr.*, 121 N.C. App. 129, 465 S.E.2d 301 (1995), *disc. review improvidently allowed*, 344 N.C. 624, 476 S.E.2d 105 (1996), and *Morrison-Knudsen Constr. Co. v. Dir., Office of Workers' Comp. Programs*, 461 U.S. 624, 76 L. Ed. 2d 194, 103 S. Ct. 2045 (1983).

Facts

Plaintiff, a fleet service worker for defendant-employer U.S. Airways, suffered a compensable back injury on 12 July 2000 while attempting to lift a piece of heavy luggage from a baggage belt. Following the injury, plaintiff had a disc laminectomy and a fusion with hardware implantation. Because of his injury-related pain, plaintiff has received nerve root injections, undergone radio-frequency nerve obliteration procedures, and taken medication. At the time of the hearing before the deputy commissioner on 25 May 2005, plaintiff was still receiving temporary total disability due to the 12 July 2000 injury.

The terms of plaintiff's employment were set out in the "1999 Agreement Between U.S. Airways, Inc. and The International Association of Machinists and Aerospace Workers" (the "Agreement"). Under the Agreement, plaintiff was entitled to participate in two separate retirement programs: an "Employee Savings Plan" and an "Employee Pension Plan."

The Savings Plan is a 401(k) plan that allows employees to defer a certain percentage of their eligible income for retirement. Defendant-employer, in turn, will match 50% of the employee's personal contribution, up to 4% of the employee's eligible income, and will deposit the "matching" sum into the employee's savings account. In other words, the amount that defendant-employer is obligated to deposit into the savings account could vary between 0% and 2% depending on whether and how much the employee personally contributed.

The Pension Plan, unlike the Savings Plan, is funded entirely by contributions from defendant-employer. Because fleet service workers such as plaintiff are eligible for the Pension Plan, defendant-employer automatically made the obligatory contributions into plain-

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tiff's pension account. The amount contributed to each employee's account is calculated based on the employee's income and age.

Despite their differences, the Savings and Pension Plans have some common features. Fidelity Investment Services administers the accounts in each plan. Fidelity offers a mix of pre-selected investment options, including mutual funds, stocks, and bonds, in which the employees can invest their personal contributions as well as defendant-employer's contributions. Although the investment options available to employees are the same under both the Savings and the Pension Plan, Fidelity maintains the accounts for each plan separately.

Shortly after plaintiff's injury, defendants filed a Form 22 that reported plaintiff's average weekly wage as \$825.55, a sum omitting defendant-employer's contributions to plaintiff's Savings Plan account and to plaintiff's Pension Plan account. In the 52 weeks preceding plaintiff's injury, defendant-employer had contributed \$1,798.33 to plaintiff's Pension Plan account and an additional \$899.17 to plaintiff's Savings Plan account. Inclusion of these contributions would have increased plaintiff's average weekly wage by \$51.87 or the total amount of defendant-employer's retirement contributions divided by 52.

On 23 November 2004, plaintiff requested a hearing because the parties were unable to agree on whether defendant-employer's retirement contributions were part of his average weekly wage. Following a 25 May 2005 hearing, Deputy Commissioner Phillip A. Holmes entered an opinion and award concluding that defendant-employer's contributions to the retirement accounts should not be included in the calculation of plaintiff's average weekly wage.

Plaintiff appealed to the Full Commission, which entered an opinion and award agreeing with the deputy commissioner. The Commission held that the retirement contributions represented a "fringe benefit . . . that should not be included in the calculation of [plaintiff's] average weekly wage" and further determined that "[p]laintiff's correct average weekly wage is \$825.55," the amount originally reported by defendants. Plaintiff timely appealed to this Court from the Commission's opinion and award.

Discussion

The only question arising in this appeal is whether defendant-employer's contributions to plaintiff's two retirement accounts

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(Savings and Pension) should be included in his “average weekly wage.” The calculation of an injured worker’s compensation under our Workers’ Compensation Act is based on his or her “average weekly wage” as defined by N.C. Gen. Stat. § 97-2(5).¹

N.C. Gen. Stat. § 97-2(5) “sets forth in priority sequence five methods by which an injured employee’s average weekly wages are to be computed, and in its opening lines, this statute defines or states the meaning of ‘average weekly wages.’ ” *McAninch v. Buncombe County Sch.*, 347 N.C. 126, 129, 489 S.E.2d 375, 377 (1997). In this case, plaintiff argues that defendant-employer’s retirement contributions should be included when calculating his average weekly wage pursuant to the first method. Under the first method, “[a]verage weekly wages’ shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury . . . divided by 52.” N.C. Gen. Stat. § 97-2(5). *See also McAninch*, 347 N.C. at 129, 489 S.E.2d at 377 (noting “the primary method, set forth in the first sentence, is to calculate the total wages of the employee for the fifty-two weeks of the year prior to the date of injury and to divide that sum by fifty-two”).

While the word “earnings” appears to be the key concept in defining “average weekly wage,” the Workers’ Compensation Act does not specify what is, or what is not, encompassed within the term “earnings.” Our task is to determine whether the legislature intended to exclude from “earnings” defendant-employer’s contributions to plaintiff’s retirement accounts. *Morris v. Laughlin Chevrolet Co.*, 217 N.C. 428, 430, 8 S.E.2d 484, 485 (1940) (“ ‘The object of all interpretation of statutes is to ascertain the meaning and intention of the Legislature, and to enforce it.’ ” (quoting *Kearney v. Vann*, 154 N.C. 311, 315, 70 S.E. 747, 749 (1911))).

Unlike other jurisdictions, North Carolina has not, in its Workers’ Compensation Act, chosen to expressly exclude fringe benefits from an average weekly wage calculation. *See, e.g.*, 76 Del. Laws ch. 1, § 5 (2007) (amending Del. Code Ann. tit. 19, § 2302) (“ ‘Average weekly wage’ means the weekly wage earned by the employee at the time of the employee’s injury at the job in which the employee was injured, including overtime pay, gratuities and regularly paid bonuses . . . but

1. Curiously, defendants, in their brief, only defend the Commission’s decision with respect to the exclusion of the Savings Plan matching contributions, even though plaintiff has challenged the omission of contributions to both the Savings and Pension Plan accounts.

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excluding all fringe or other in-kind employment benefits.”); N.M. Stat. Ann. § 52-1-20 (2003) (“‘average weekly wage’ means the weekly wage earned by the worker at the time of the worker’s injury, including overtime pay and gratuities but excluding all fringe or other employment benefits and bonuses”); 77 Pa. Stat. Ann. § 582 (2001) (“The terms ‘average weekly wage’ and ‘total wages,’ . . . [shall not] include fringe benefits, including, but not limited to, employer payments for or contributions to a retirement, pension, health and welfare, life insurance, social security or any other plan for the benefit of the employee or his dependents . . .”). The United States Congress has also excluded fringe benefits for purposes of calculating compensation under the federal Longshore and Harbor Workers’ Compensation Act. *See* 33 U.S.C. § 902(13) (2000) (“The term wages does not include fringe benefits, including (but not limited to) employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan . . .”).

Although our General Assembly did not expressly address fringe benefits in the Workers’ Compensation Act, it did so in the Employment Security Act. The Employment Security Act specifically excludes many fringe benefits from the definition of “wages” set out in that Act: “The term ‘wages’ shall not include the amount of any payment with respect to services to, or on behalf of, an individual in its employ under a plan or system established by an employing unit . . . on account of (i) retirement, or (ii) sickness or accident disability, or (iii) medical and hospitalization expenses in connection with sickness or accident disability or (iv) death.” N.C. Gen. Stat. § 96-8(13)(a) (2005). *See also* N.C. Gen. Stat. § 96-8(13)(b) (excluding other employee benefits from definition of “wages” under Employment Security Act). The Employment Security Act demonstrates that the General Assembly knows that employee benefits are an issue with respect to the concept of wages and knows how to specifically exclude them from a definition of wages when it intends to do so. We, therefore, cannot, with respect to the Workers’ Compensation Act, simply presume the General Assembly intended to exclude all fringe benefits from the term “earnings.” *See Deese v. Southeastern Lawn & Tree Expert Co.*, 306 N.C. 275, 278, 293 S.E.2d 140, 143 (1982) (“[I]t is not reasonable to assume that the legislature would leave an important matter regarding the administration of the [Workers’ Compensation] Act open to inference or speculation; consequently, the judiciary should avoid ‘ingrafting upon a law something that has been omitted, which [it] believes ought to have been embraced.’”

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(quoting *Shealy v. Associated Transport, Inc.*, 252 N.C. 738, 741, 114 S.E.2d 702, 705 (1960)).

Indeed, the statute itself indicates that at least some fringe benefits may be encompassed within the average weekly wage calculation. The statute provides that: “Wherever allowances of any character made to an employee in lieu of wages are specified part of the wage contract, they shall be deemed a part of his earnings.” N.C. Gen. Stat. § 97-2(5).²

The principal North Carolina case to consider whether an employer-funded fringe benefit should be included within an average weekly wage calculation is *Kirk v. N.C. Dep’t of Corr.*, 121 N.C. App. 129, 465 S.E.2d 301 (1995), *disc. review improvidently allowed*, 344 N.C. 624, 476 S.E.2d 105 (1996). In *Kirk*, the plaintiff—the next of kin of a deceased state worker—sought to include the State’s contributions to the employee’s health insurance in the computation of the average weekly wage. While this Court concluded that the health insurance contributions should not be included when calculating the employee’s average weekly wage, nothing in *Kirk* suggests that all fringe benefits should be excluded from the average weekly wage computation.

Accordingly, neither the statute nor this Court’s prior opinions supports the Full Commission’s conclusion that defendant-employer’s contributions to the two plans should not be included within the average weekly wage calculation simply because they constituted fringe benefits. The question whether N.C. Gen. Stat. § 97-2(5) encompasses retirement contributions such as those in this case is one of first impression. Other jurisdictions have considered the question and reached conflicting conclusions. *See Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228, 230, 472 S.E.2d 397, 399 (1996) (consulting foreign case law to address question of first impression under North Carolina Workers’ Compensation Act); *South Carolina Ins. Co. v. Smith*, 67 N.C. App. 632, 634, 313 S.E.2d 856, 858 (“As the particular question before us has never been confronted by the courts of this State, in addition to reviewing pertinent North Carolina authority, we

2. In its first conclusion of law, the Commission noted that plaintiff presented no evidence and did not argue that the Savings and Pension Plan contributions were allowances “in lieu of wages.” Plaintiff also did not include any assignment of error on appeal purporting to argue that defendant-employer’s contributions were allowances in lieu of wages. Accordingly, we have no occasion in this case to consider whether the contributions might qualify as such allowances. *Cf. Greene v. Conlon Constr. Co.*, 184 N.C. App. 364, 366, 646 S.E.2d 652, 655 (2007) (holding that weekly payment of \$320.00 to employee for meals and lodging was an allowance in lieu of wages).

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have examined cases from other jurisdictions . . .”), *disc. review denied*, 311 N.C. 306, 317 S.E.2d 682 (1984).

The leading treatise on workers’ compensation law makes the following general observation: “In computing actual earnings as the beginning point of wage-basis calculations, there should be included not only wages and salary but *any thing of value received as consideration for the work*, as, for example, tips, bonuses, commissions and room and board, *constituting real economic gain to the employee.*” 5 Arthur Larson and Lex K. Larson, *Larson’s Workers’ Compensation Law* § 93.01[2][a], at 93-19 (2005) (emphasis added). Nonetheless, many jurisdictions have held that pension or retirement plan contributions do not belong to the category of valuable “things” that form the basis of wages for purposes of calculating workers’ compensation benefits. *See, e.g., Luce v. United Techs. Corp.*, 247 Conn. 126, 133-41, 717 A.2d 747, 752-55 (1998) (construing Connecticut’s “average weekly wage” definition to exclude insurance and pension benefits); *Barnett v. Sara Lee Corp.*, 97 Md. App. 140, 148, 627 A.2d 86, 90-91 (holding that “average weekly wage” does not include pension contributions and noting that “[h]ad it so intended, the Maryland legislature could have specified fringe benefits such as pension contributions within the ‘wages’ definition”), *cert. denied*, 332 Md. 702, 632 A.2d 1207 (1993); *Antillon v. N.M. State Highway Dep’t*, 113 N.M. 2, 5-6, 820 P.2d 436, 440 (1991) (holding that contributions to state retirement plan “are not within the definition of ‘wages’” under New Mexico’s workers’ compensation scheme).

The leading case espousing the view that the value of “fringe benefits,” such as employer-funded pension or insurance benefits, should not be factored into wage calculations is the United States Supreme Court’s decision in *Morrison-Knudsen Constr. Co. v. Dir., Office of Workers’ Comp. Programs*, 461 U.S. 624, 76 L. Ed. 2d 194, 103 S. Ct. 2045 (1983). In that case, the Supreme Court held that employer contributions to union trust funds for health and welfare, pensions, and training were not encompassed by the then-existing definition of “wages” in the Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. § 902(13). *Id.* at 629-30, 76 L. Ed. 2d at 199, 103 S. Ct. at 2048-49.

The statute defined “wages” as “the money rate at which the service rendered is recompensed . . . including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer” *Id.* at 629, 76 L. Ed. 2d at 199, 103 S. Ct. at 2048 (quoting 33 U.S.C. § 902(13)). Thus, the “narrow question” before the

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Court was whether such employer “contributions are a ‘similar advantage’ to ‘board, rent, housing, [or] lodging.’” *Id.* at 630, 76 L. Ed. 2d at 199, 103 S. Ct. at 2048 (alteration original). Although the Court reviewed relevant legislative history as well as statutory structure and underlying policy goals, the Court primarily decided as a matter of plain meaning that the employer contributions to the union trust funds were not “wages” because, unlike board or lodging, these contributions did not have a “present value . . . readily convert[ible] into a cash equivalent.” *Id.*, 103 S. Ct. at 2049.

According to *Larson’s*, “[t]he Supreme Court’s examination of the ‘wages’ definition within the Longshore Act represents the majority position on the treatment of fringe benefits.” *Larson’s*, § 93.01[2][b], at 93-22. *Larson’s* itself generally agrees with the *Morrison-Knudsen* ruling and cautions against judicial interpretation of the concept of “wages” to indiscriminately include fringe benefits:

Workers’ compensation has been in force in the United States for over eighty years, and fringe benefits have been a common feature of American industrial life for most of that period. Millions of compensation benefits have been paid during this time. Whether paid voluntarily or in contested and adjudicated cases, they have always begun with a wage basis calculation that made “wage” mean the “wages” that the worker lives on and not miscellaneous “values” that may or may not someday have a value to him or her depending on a number of uncontrollable contingencies. Before a single court takes it on itself to say, “We now tell you that, although you didn’t know it, you have all been wrongly calculating wage basis in these millions of cases, and so now, after eighty years, we are pleased to announce that we have discovered the true meaning of ‘wage’ that somehow eluded the rest of you for eight decades,” that court would do well to undertake a much more penetrating analysis than is visible in the [D.C.] Circuit Court’s opinion in [*Morrison-Knudsen*] [i.e., the opinion reversed by the Supreme Court] of why this revelation was denied to everyone else for so long.

Id., § 93.01[2][b], at 93-21 to -22.

Contrary to the majority view, some jurisdictions have held that fringe benefits should be included when calculating the amount of the workers’ compensation benefit, at least where the worker’s right to such benefits is vested or where the amount of benefits was based on the units of time worked. See *Ragland v. Morrison-Knudsen Co.*, 724

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P.2d 519, 520 (Alaska 1986) (holding “that the readily identifiable and calculable value of fringe benefits,” in which worker was indisputably vested and which were the product of a collective bargaining agreement, “should be included in the wage determination”); *Ashby v. Rust Eng’g Co.*, 559 A.2d 774, 774-76 (Me. 1989) (where collective bargaining agreement committed employer to pay a certain amount “to various union-established funds for employee health benefits, pension benefits, etc.,” and where such payments were based on “unit of employee time worked,” court held that “such payments fall under the definition of ‘average weekly wages, earnings or salary’ for purposes of calculating compensation benefits”), *superceded by statute as stated in Hincks v. Robert Mitchell Co.*, 1999 ME 172, § 9, 740 A.2d 992, 995 (1999) (“shortly after our decision in *Ashby*, the Legislature enacted P.L. 1991, ch. 615, § A-20, providing that fringe benefits may not be included in an employee’s average weekly wage”).

We do not consider this issue on an entirely blank slate. This Court in *Kirk*, although not bound by *Morrison-Knudsen* in construing the North Carolina Workers’ Compensation Act, found the United States Supreme Court’s analysis relevant to the determination whether it would be “unfair” to exclude Kirk’s health insurance benefits from the calculation of his average weekly wage. More specifically, the *Kirk* Court relied on the “reasoning” in *Morrison-Knudsen* “that wage means ‘the money rate at which service is recompensed under the contract of hiring’ and not ‘fringe benefits that cannot be converted into a cash equivalent.’” *Kirk*, 121 N.C. App. at 136, 465 S.E.2d at 306 (quoting *Morrison-Knudsen*, 461 U.S. at 629, 76 L. Ed. 2d at 199, 103 S. Ct. at 2048). Applying this reasoning, *Kirk* held:

A State employee receives the benefits of the State Health Plan only when needed. The value of this benefit cannot be quantified. After carefully considering the evidence, we cannot say that the Commission’s failure to include such allowance produced an unfair result for the plaintiff. Thus, absent a finding that method two produces an unfair result, the Commission did not err by excluding the State’s contributions to Kirk’s Health Plan in the calculation of Kirk’s average weekly wages.

Id.

In *Kirk*, the plaintiff did not argue that the health insurance contributions were “earnings” under N.C. Gen. Stat. § 97-2(5), as plaintiff has in this case. Rather, the plaintiff in *Kirk* contended that these con-

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tributions should be included pursuant to the “fourth method” for computing average weekly wage under § 97-2(5), arguing that it would be “unfair” to exclude them. *Id.* at 135, 465 S.E.2d at 305. The “fourth method,” which explicitly incorporates a “fairness” component, provides: “where for exceptional reasons the foregoing [methods] would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.” N.C. Gen. Stat. § 97-2(5).³

While *Kirk* did not directly analyze the term “earnings” as used within N.C. Gen. Stat. § 97-2(5), the decision may be fairly read as holding that the State-provided health insurance contributions were not “earnings” because they were “‘fringe benefits that cannot be converted into a cash equivalent.’” *Kirk*, 121 N.C. at 135, 465 S.E.2d at 305. Under *Kirk*, therefore, employee benefits must be considered on a case-by-case basis to determine whether they can be converted into a cash equivalent. If so, such benefits may be considered as part of the worker’s average weekly wage.

Neither *Kirk* nor *Morrison-Knudsen* elaborated on what it means to be capable of conversion into a cash equivalent. Although *Morrison-Knudsen* concluded that the pension plans at issue in that case could not be “converted into a cash equivalent on the basis of their market values,” 461 U.S. at 630, 76 L. Ed. 2d at 199, 103 S. Ct. at 2049, the reasoning does not necessarily appear applicable to the terms of the retirement accounts in this case. The Supreme Court in *Morrison-Knudsen* rejected the respondent’s suggestion that the benefits could be converted into a cash value “by reference to the employer’s cost of maintaining these funds or to the value of the employee’s expectation interests in them” *Id.*, 76 S.E.2d at 199-200, 103 S. Ct. at 2049. The Court concluded that the employer’s cost “measures neither the employee’s benefit nor his compensation.” The Court explained:

It does not measure the benefit to the employee because his family could not take the 68¢ per hour earned by Mr. Hilyer to the open market to purchase private policies offering similar benefits to the group policies administered by the union’s trustees. It does not measure compensation because the collec-

3. Although *Kirk*, 121 N.C. App. at 136, 465 S.E.2d at 306, also held that “contributions by the State to insure an employee under a health plan is not an allowance made ‘in lieu of wages’ within the meaning of this statute,” the allowance-in-lieu-of-wages provision, for reasons discussed above, is not at issue here.

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tive-bargaining agreement does not tie petitioner's costs to its workers' labors. . . . He derives benefit from the Pension and Disability Fund according to the "pension credits" he earns. These pension credits are not correlated to the amount of the employer's contribution; the employer pays benefits for every hour the employee works, while the employee earns credits only for the first 1,600 hours of work in a given year. Furthermore, although the employer is never refunded money that has been contributed, the employee can lose credit if he works less than 200 hours in a year or fails to earn credit for four years. Significantly, the employee loses all advantage if he leaves his employment before he attains age 40 and accumulates 10 credits.

Id. at 630-31, 76 L. Ed. 2d at 200, 103 S. Ct. at 2049.

By contrast, in this case, the record contains evidence from which the Commission could find that the employer's cost in at least the Pension Plan measures the employee's benefit and his compensation. Plaintiff offered evidence that the amount paid was tied to his specific labors—in other words, the hours that he worked. According to plaintiff, for every hour that he worked, he received a specific amount of money. The amount of money he earned was then deposited into plaintiff's own, individual account and not an overall trust fund. If he were given this amount directly, he could invest it in a similar account, such as the 401(k) Savings Plan in which plaintiff was already permitted to deposit a percentage of his earnings or a private IRA account. Contrary to the Pension and Disability Fund in *Morrison-Knudsen*, plaintiff will not lose any of the amounts deposited in those accounts if he leaves his employment. The Commission did not consider the Supreme Court's discussion of the "employer's cost" and whether that reasoning fits the evidence in this case regarding the plan.

In *Morrison-Knudsen*, the Supreme Court also rejected the respondent's alternative argument that the value of the trust funds could be calculated based on the value of "the employee's expectation interest" in them, holding that the employee's interest is "at best speculative," because employees have no voice in the administration of these plans and thus have no control over the level of funding or the benefits provided and because "the value of each fund depends on factors that are unpredictable." *Id.* at 631, 76 L. Ed. 2d at 200, 103 S. Ct. at 2049. For the Pension and Disability Fund at issue in that case, the Court observed that its value "depends on whether [the employee's] interest vested" *Id.*

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The Commission, in this case, appears to have focused entirely on this allusion to “speculative” benefit to the employee, a factor also considered by this Court in *Kirk*. Yet, the Commission did not address the fact that plaintiff’s interest in the retirement benefits, in contrast to *Morrison-Knudsen*, was vested, thus eliminating the sole concern of the Supreme Court with respect to pension plans.

The speculative nature of any benefit was the primary concern of this Court in *Kirk*. Although *Kirk* found that the value of the benefits derived from having state-funded health insurance “cannot be quantified,” such benefits were deemed unquantifiable because the state employee would only benefit from the insurance contributions if, and only if, he became sick and needed to visit a doctor. *Kirk*, 121 N.C. App. at 136, 465 S.E.2d at 306 (“A State employee receives the benefits of the State Health Plan only when needed.”).

Similarly, in parsing Congress’ exclusion of fringe benefits from “wages” under the Longshore Act, the Fourth Circuit in *Universal Maritime Serv. Corp. v. Wright*, 155 F.3d 311, 324 (4th Cir. 1998) (emphasis added), explained that “[t]he value that an employee derives from employer contributions to retirement, pension, life insurance, and similar benefit plans is too speculative to be readily converted into a cash equivalent *because the employee’s right to obtain tangible benefits is contingent on fulfilling conditions that might never be satisfied.*” The Fourth Circuit ultimately concluded: “When an employee’s right to a tangible benefit does not depend on contingent factors . . . , the value of the benefit is not too speculative to be readily converted into a cash equivalent under the [Longshore] Act. *As long as the employee earns an unconditional entitlement to a tangible benefit (even though the benefit may not be received until sometime in the future), the value of the benefit can be identified and calculated as a part of the employee’s wages.*” *Id.* at 324 n.14 (emphasis added).

The Commission, however, in determining that the value of the benefit was speculative considered only the feasibility of estimating how much plaintiff could actually withdraw from his retirement accounts at any given time in the future, as reflected in the following findings of fact:

10. There was a period of 30 days between a participant’s termination date and when employees could actually gain access to the funds in their retirement account. This period allowed defendant-employer’s payroll department time to make any nec-

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essary adjustments before the employee's account was withdrawn. Also, if an employee terminated employment before the age of 55 and chose to cash out his retirement account, he had 20% of the value withheld for taxes and was subject to an additional 10% early withdrawal penalty.

11. Although it would be possible to add up all of the various contributions and deferrals made into an employee's retirement fund over the course of his employment, the Commission finds that estimating how much an employee could actually withdraw at any given time would be virtually impossible because the amount could be higher or lower based upon the employee's investment gains and losses. In addition, any amount plaintiff has in his retirement account is subject to applicable state and federal taxes, as well as a 10% early withdrawal penalty if he cashed out prior to the age of 55, further complicating the quantification of his actual benefit.

In focusing on the question of quantification at some point in time in the future, the Commission lost sight of the more important question: plaintiff's actual earning capacity. See *Derebery v. Pitt County Fire Marshall*, 318 N.C. 192, 197, 347 S.E.2d 814, 817 (1986) (explaining that "the purpose of the average weekly wage basis" is to serve "as a measure of the injured employee's earning capacity"). The issue whether the employer's contributions will be subject to "investment gains and losses" in the future cannot be the determinative factor.

For example, there is no dispute here that the portion of plaintiff's wages that he chose to contribute to the Savings Plan should be included in his average weekly wage. Yet, the Commission's analysis would apply equally to those contributions. Just like defendant-employer's contributions, plaintiff's personal contributions will be subject to the vicissitudes of the stock market and would be subject to taxes and penalties if withdrawn early. Under the Commission's rationale, plaintiff's personal contributions to his Savings Plan account would have to be excluded from his "earnings" because intervening market fluctuations might result in "investment gains and losses." Nevertheless, we of course include as part of an employee's earnings the portion of his wages that he seeks to contribute to a 401(k) plan, such as the Savings Plan in this case.

The relevant point in time for "valuation" of those wages voluntarily contributed to the Savings Plan is the amount paid by the employer to the employee on payday. Logically, therefore, the ques-

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tion whether a benefit paid by the employer is convertible into a cash equivalent should be considered as of the date the employer made the contribution and not some unspecified date in the future. *See Morrison-Knudsen*, 461 U.S. at 630, 76 L. Ed. 2d at 199, 103 S. Ct. at 2049 (focusing on whether “[t]he present value” of the employee benefits is “readily converted into a cash equivalent”).

We believe the *Universal Maritime* test is an appropriate first step in determining whether an employee benefit can meet the standard set out in *Morrison-Knudsen* and adopted in *Kirk*: Did the employee earn “an unconditional entitlement to a tangible benefit (even though the benefit [might] not be received until sometime in the future)?” *Universal Maritime*, 155 F.3d at 324 n.14. If so, then *Morrison-Knudsen*’s and *Kirk*’s concern about the speculative nature of a benefit will have been addressed. In determining further whether the present value of the benefit is readily converted into a cash equivalent, the Commission should apply the reasoning in *Morrison-Knudsen* to see whether the proposed valuation “measures . . . the employee’s benefit [or] his compensation.” 461 U.S. at 630, 76 L. Ed. 2d at 200, 103 S. Ct. at 2049.

Such an analysis upholds the basic purpose of N.C. Gen. Stat. § 97-2(5), which is to ensure that, in determining the amount of compensation due, the result achieved is fair and just to both the injured worker and the employer. *See McAninch*, 347 N.C. at 130, 489 S.E.2d at 378 (“Ultimately, the primary intent of this statute is that results are reached which are fair and just to both parties.”); *Loch v. Entm’t Partners*, 148 N.C. App. 106, 110, 557 S.E.2d 182, 185 (2001) (“The primary intent of the N.C. Gen. Stat. § 97-2(5) is to make certain that the results reached are fair and just to both parties.”).

The exclusion of tangible, unconditional benefits from an employee’s pre-injury “earnings” could, in our view, unfairly hurt workers whose employment contracts call for greater amounts of so-called “fringe” benefits and lesser amounts of cash remuneration. Such an average weekly wage would not necessarily provide an accurate measure of earning capacity. On the other hand, by limiting inclusion to benefits that meet the concerns set forth in *Morrison-Knudsen* and *Kirk*, employers are protected from an unreasonable expansion of the concept of “earnings.”

We hold, in short, that the Commission acted under a misapprehension of the law when it concluded that defendant-employer’s contributions to plaintiff’s two retirement accounts should not be

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included in the calculation of plaintiff's average weekly wage. To the extent that the Commission believed that no fringe benefits should be included, that conclusion is not supported by the statute or prior case law. Further, the Commission did not consider proper factors in determining that the retirement contributions could not be readily converted into a cash equivalent. In this case, like the respondent in *Morrison-Knudsen*, plaintiff argues that the amount paid by the employer is a proper measure of value. After determining whether plaintiff was entitled to an unconditional tangible benefit, the Commission should have followed the reasoning in *Morrison-Knudsen* in assessing whether the employer's contributions measure plaintiff's benefit or his compensation.

It is well established that where "the conclusions of the Commission are based upon a . . . misapprehension of the law, the case should be remanded so 'that the evidence [may] be considered in its true legal light.'" *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005) (quoting *McGill v. Town of Lumberton*, 215 N.C. 752, 754, 3 S.E.2d 324, 326 (1939)). Accordingly, we reverse the Commission's opinion and award and remand this matter so that the Commission may consider the evidence anew under the proper legal standard.

We note that, in some of its findings, the Commission did not consider each of the retirement plans individually. On remand, the Commission should make specific findings of fact relating to each plan and make a separate determination as to whether the employer contribution for that plan should be included in calculating the average weekly wage. We leave to the discretion of the Commission whether to accept additional evidence relating to this issue.

As a final matter, we urge the General Assembly to review N.C. Gen. Stat. § 97-2(5). Our Workers' Compensation Act is a comprehensive statutory "compromise between the employer's and employee's interests." *Whitley v. Columbia Lumber Mfg. Co.*, 318 N.C. 89, 98, 348 S.E.2d 336, 341 (1986). The definition of "average weekly wage" in N.C. Gen. Stat. § 97-2(5) is a central element of this compromise. In other states, the legislature has clarified its intent after their states' appellate courts have struggled to decide how to treat fringe benefits. Because of the prevalence of benefits such as those in this case, we believe guidance by the General Assembly in this area is critical.

Reversed and remanded with instructions.

Judge ELMORE concurs.

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Judge HUNTER dissents in a separate opinion.

HUNTER, Judge, dissenting.

Because I would affirm the Full Commission's holding in this case, I respectfully dissent.

I believe the majority opinion is based on misinterpretations of the relevant statute and case law, expanding the meaning of each to an impermissible and illogical extent. Any more detailed mandates on what may and may not be included in these computations must come from our legislature, not from this Court, and as such remand to the Commission is inappropriate.

I. N.C. Gen. Stat. § 97-2(5)

Here, with irrelevant portions removed, is the statute at issue:

- (5) Average Weekly Wages.—[First method:] “Average weekly wages” shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury [Second method:] Where the employment prior to the injury extended over a period of fewer than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; *provided, results fair and just to both parties will be thereby obtained.* [Third method:] Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.

[Fourth method:] *But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.*

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Wherever allowances of any character made to an employee in lieu of wages are specified part of the wage contract, they shall be deemed a part of his earnings.

N.C. Gen. Stat. § 97-2(5) (2005) (emphasis added).⁴

A. “Unfairness”

The majority opinion makes much of the fact that the statute authorizes the modification of the statutory methods of calculation where unfairness would result. This is a misinterpretation of the plain language of the statute.

The italicized portions of the statute above are the only sections in which “fairness” is discussed. As our Supreme Court has noted, the statute provides an “order of preference” for which method of calculation is to be used, and “the primary method, set forth in the first sentence, is to calculate the total wages of the employee for the fifty-two weeks of the year prior to the date of injury and to divide that sum by fifty-two.” *McAninch v. Buncombe County Schools*, 347 N.C. 126, 129, 489 S.E.2d 375, 377 (1997). “The final method, as set forth [as the fourth method above], clearly may not be used unless there has been a finding that unjust results would occur by using the previously enumerated methods.” *Id.* at 130, 489 S.E.2d at 378. Thus, the fourth method—that authorizing modification to prevent an unfair result—is a failsafe option to remedy those *exceptional cases* where the wage as calculated by one of the first three methods produced a result unfair to either party. That is, it is not a fourth alternative, equal to the others; it is a provision to resort to when to do otherwise would create injustice. It is also not a method for evaluating individual benefits for inclusion in this calculation.

B. Plain language

North Carolina General Statute 97-2(5) does not cover the types of benefits at issue in this case. As defendants note, in 1929, when the North Carolina Workers’ Compensation Act was enacted, the type of pension plans at issue here were almost nonexistent, and none of the ensuing amendments in the many years since have held that employer

4. As is clear from the language quoted, the statute provides two types of compensation that may be included in a computation of “weekly wages”: (1) wages and (2) compensation received “in lieu of wages.” As the majority notes, plaintiff does not argue to this Court that the benefits at issue should be considered compensation “in lieu of wages,” and as such, the only way the benefits could be included in this calculation is if we were to consider them included in the term “wages.”

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contributions to such plans should be considered “wages” for the purpose of the Act, even though such contributions have been addressed in other statutes. *See, e.g.*, N.C. Gen. Stat. § 96-8(13)(b)(1) (2005) (stating “‘[w]ages’ shall not include: 1. Any payment made to, or on behalf of, an employee . . . from or to a trust that qualifies under the conditions set forth in sections 401(a)(1) and (2) of the Internal Revenue Code”). There is nothing in either the statute itself or the case law that supports such an expansion of the law. As the majority notes, many jurisdictions that have considered this question have held that general language in workers’ compensation statutes should not be read to include pension contributions as part of “wages.” *See, e.g., Barnett v. Sara Lee Corp.*, 97 Md. App. 140, 148-50, 627 A.2d 86, 90-91 (holding that “[h]ad it so intended, the Maryland legislature could have specified fringe benefits such as pension contributions within the ‘wages’ definition” and, since it did not, the Court would not expand the definition to include it) *cert. denied*, 332 Md. 702, 632 A.2d 1207 (1993); *Luce v. United Techs. Corp.*, 247 Conn. 126, 717 A.2d 747 (1998); *Antillon v. N.M. State Highway Dep’t*, 820 P.2d 436, 440 (N.M. Ct. App. 1991).

The portion of *Larson’s Workers’ Compensation Law* quoted by the majority bears repeating here:

Workers’ compensation has been in force in the United States for over eighty years, and fringe benefits have been a common feature of American industrial life for most of that period. Millions of compensation benefits have been paid during this time. Whether paid voluntarily or in contested and adjudicated cases, they have always begun with a wage basis calculation that made “wage” mean the “wages” that the worker lives on and not miscellaneous “values” that may or may not someday have a value to him or her depending on a number of uncontrollable contingencies. Before a single court takes it on itself to say, “We now tell you that, although you didn’t know it, you have all been wrongly calculating wage basis in these millions of cases, and so now, after eighty years, we are pleased to announce that we have discovered the true meaning of ‘wage’ that somehow eluded the rest of you for eight decades,” that court would do well to undertake a much more penetrating analysis than is visible in the [Circuit Court opinion in *Morrison-Knudsen*, reversed by the Supreme Court,] of why this revelation was denied to everyone else for so long.

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5 Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law* § 93.01[2][b], at 93-21 to -22 (2005). Even as it cites to this treatise, the majority opinion runs afoul of its warning.

C. Guiding principles

The majority cites to *Deese v. Lawn and Tree Expert Co.*, 306 N.C. 275, 293 S.E.2d 140 (1982), as support for its statement that this Court cannot presume that our legislature intended to exclude all fringe benefits, including those at issue in the case at hand, from the definition of “wages.” This conclusion, however, goes against *Deese's* statement of this Court's guiding principles in this type of interpretation:

This Court has interpreted the statutory provisions of North Carolina's workers' compensation law on many occasions. In every instance, we have been wisely guided by several sound rules of statutory construction which bear repeating at the outset here. First, the Workers' Compensation Act should be liberally construed, whenever appropriate, so that benefits will not be denied upon mere technicalities or strained and narrow interpretations of its provisions. Second, such liberality should not, however, extend beyond the clearly expressed language of those provisions, and our courts may not enlarge the ordinary meaning of the terms used by the legislature or engage in any method of “judicial legislation.” Third, it is not reasonable to assume that the legislature would leave an important matter regarding the administration of the Act open to inference or speculation; consequently, *the judiciary should avoid “ingrafting upon a law something that has been omitted, which [it] believes ought to have been embraced.”*

Id. at 277-78, 293 S.E.2d at 142-43 (citations omitted; alteration in original; emphasis added). The majority's opinion engages in precisely the type of judicial legislation and “ingrafting upon [the] law” that these principles forbid. The Workers' Compensation statute makes no mention of the types of benefits at issue here, and it is not the place of this Court to impose on the statute a concept or language that it believes the legislature should have included. As can be seen from the quote above, the only alternative to a basic wage calculation is when certain benefits have been offered “in lieu of wages,” and that portion of the statute has not been put in issue in this case. N.C. Gen. Stat. § 97-2(5). For this Court to hold that the statute does in fact cover a range of other benefits is tantamount to imposing our own language onto the statute.

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II. *Kirk* and *Morrison-Knudsen*

Essentially, here, the majority has taken two cases that exclude fringe benefits—*Morrison-Knudsen* and *Kirk*—and cobbled them together to support a holding that the benefits at issue here should *not* be excluded. An in-depth look at these two cases shows that they do not support the majority's holding.

A. *Morrison-Knudsen*

Kirk mentions *Morrison-Knudsen* briefly, and the majority opinion in this case treats *Morrison-Knudsen* as part of the foundation on which its opinion is built. However, that case dealt with a specific federal statute—the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 902(13)—and the language that the Court closely analyzed was substantially different than that at issue here:

“‘Wages’ means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer.”

Morrison-Knudsen Constr. Co. v. Director, OWCP, 461 U.S. 624, 629, 76 L. Ed. 2d 194, 199 (1983) (quoting 33 U.S.C. § 902(13)). The essence of the Court's holding was that only benefits similar to “‘board, rent, housing, [or] lodging’” would be considered part of “‘wages’” under the statute, and the important quality that those benefits shared were their “present value that can be readily converted into a cash equivalent on the basis of their market values.” *Id.* at 630, 76 L. Ed. 2d at 199. The Court's subsequent analysis and elaboration on this point show that this statement does not mean that if a benefit can be easily quantified it should be included; rather, it means that only benefits with some ascertainable present value—as opposed to a future, theoretical value—may be included in this calculation. That is, the types of benefits—compensation for rent or housing, for example—that may be (and frequently are) translated into simple cash payments added on to an employee's paycheck. These are the kinds of benefits that an employee could in all likelihood choose to have provided to him as a cash payment.

This is not true of the types of benefits at issue in *Kirk* or in the case at hand. In *Kirk*, the benefit was the employer's contribution to a trust fund for the employee's health insurance; in *Morrison-*

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Knudsen, it was a union trust fund for a variety of health-related costs, including insurance and disability; here, it is the contribution to pension funds. In neither case could the employee go to the employer and demand that the benefits be ceased and, instead, that the employee begin receiving the benefits' cash equivalent.

B. *Kirk*

The majority opinion misconstrues in several ways the holding of *Kirk v. State of N.C. Dept. of Correction*, 121 N.C. App. 129, 465 S.E.2d 301 (1995), *disc. review improvidently allowed*, 344 N.C. 624, 476 S.E.2d 105 (1996). *Kirk* is not, as the majority suggests, a mandate to analyze various benefits on a case-by-case basis to determine whether they can be converted into a cash equivalent, nor does it provide authority for this Court to do so.

In *Kirk*, this Court was presented with several issues related to a workers' compensation holding by the Industrial Commission. The last such issue related to whether it was error for the Commission not to include in the weekly wage calculation the amount paid by the State, *Kirk's* employer, for his health insurance. *Kirk*, 121 N.C. App. at 134, 465 S.E.2d at 305. *Kirk* argued that the Commission erred by making the calculation based on the method outlined by this portion of the statute, which the Court refers to as "method two":

Where the employment prior to the injury extended over a period of fewer⁵ than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained.

N.C. Gen. Stat. § 97-2(5). *Kirk* contended that the Commission should have instead made its calculations based on this provision: "But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury." *Id.*

This Court held that the latter method "should not be used unless the result under method two would be unjust." *Kirk*, 121 N.C. App. at 135, 465 S.E.2d at 305. As such, the Court concluded, "absent a find-

5. *Kirk* was decided based on the 1994 version of this statute; the only difference between that version and the 2005 version at issue in the case here is that the later version uses "fewer" where the earlier version used "less."

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ing that method two produces an unfair result, the Commission did not err by excluding the State's contributions to Kirk's Health Plan in the calculation of Kirk's average weekly wages." *Id.* at 136, 465 S.E.2d at 306.

In *Kirk*, the Court cited to the United States Supreme Court's holding in *Morrison-Knudsen*, 461 U.S. 624, 76 L. Ed. 2d 194, for its reasoning that "wage means 'the money rate at which service is recompensed under the contract of hiring' and not 'fringe benefits that cannot be converted into a cash equivalent.'" *Kirk*, 121 N.C. App. at 136, 465 S.E.2d at 306. The Court then stated "[t]he same reasoning applies in the present case[,]" followed by a holding that no case law

support[s] plaintiff's position that an unfair result is reached by not including the employer's contribution to Kirk's health care. A State employee receives the benefits of the State Health Plan only when needed. The value of this benefit cannot be quantified. After carefully considering the evidence, we cannot say that the Commission's failure to include such allowance produced an unfair result for the plaintiff.

Id.

This portion of the opinion makes it clear that the ease with which a benefit may be quantified is not the dispositive factor in this issue. The Court did not hold in *Kirk* that if a court *can* quantify or value a benefit, it must be included; rather, it says if you *cannot* quantify the benefit, that is one factor to consider in excluding the benefit from this calculation.

The majority's statement that "nothing in *Kirk* suggests that all fringe benefits should be excluded from the average weekly wage computation" is a very misleading summary of that case's holding. The Court does not consider the question of inclusion for all fringe benefits for the calculation of weekly wages in *Kirk*. Instead, the Court briefly considers whether the exclusion of a certain type of fringe benefit renders an unfair result under one of the primary statutory methods of calculating wages.

III. Practical Effect

This Court's engaging in this type of judicial expansion, without the benefit of debate in the legislature as to benefits and drawbacks, will harm those employees not receiving workers' compensation: Employers will be encouraged to abandon their pension plans due to

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the unanticipated increase in costs this holding would allow. Any general expansion of the types of compensation to be covered by this statute must come from our legislature. At any time, employers and employees as private parties are free to contract for *more* than what is required by the statute; that is, if the legislature were to clarify that certain benefits are *not* covered by the statutory term “wages,” private parties may certainly execute an employment contract providing that, in this employee’s case, such benefits *will* be considered part of the employee’s wages for purposes of calculating wages under the workers’ compensation statute.

IV. Conclusion

I believe the majority opinion misconstrues the existing law in an attempt to extend it to cover benefits the statute itself does not contemplate. Any further clarification on this issue must come from our legislature, not from this Court ingrafting language upon the statute. Action on our part in the absence of the debate of merits and drawbacks inherent to the legislature will result in an inappropriate and uneven interpretation of this statute. As such, I respectfully dissent.

IN THE MATTER OF: J.G. (A.K.A. J.M.G. AND J.M.S.)

No. COA06-752

(Filed 6 November 2007)

1. Appeal and Error— appealability—use of child’s social security benefits—substantial right

An interlocutory order involving DSS’s use of a child’s Social Security benefits and its failure to make Habitat for Humanity mortgage payments was immediately appealable. A substantial right is affected in that it involves DSS’s right to use its discretion in disposing of funds that it receives in its capacity as a representative payee; that substantial right will be lost without immediate review because the DSS will not be able to recover the funds it was required to pay for the mortgage.

2. Appeal and Error— necessary issue—other issues not addressed

The pivotal issue on an appeal was whether the trial court properly ordered DSS, as the representative payee of a child’s

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Social Security benefits, to make payments on a Habitat for Humanity mortgage; it was not necessary to resolve other issues concerning the child's guardianship, the timing of the child support complaint, and an adoption subsidy.

3. Public Assistance— Social Security benefits—DSS expenditure

The North Carolina state courts are not preempted from looking into DSS's expenditure of the Social Security benefits of a child in DSS custody, and the trial court here properly exercised jurisdiction as part of its supervisory role. DSS reimbursed itself for the cost of care and did not make payments on a Habitat for Humanity mortgage for a house which would become the child's when he ages out of care.

4. Public Assistance— Social Security—anti-alienability—court ordered mortgage payments

The trial court did not violate the anti-alienability provision of the Social Security Act when it ordered DSS to use a part of a dependent child's Social Security payments for a Habitat for Humanity mortgage. In this case, no other person or entity gained control over the child's funds; DSS continued to control the funds, but was merely directed by the court in its supervisory role to use a portion of the funds to keep the mortgage current for the direct benefit of the child.

Appeal by petitioner from order entered 20 December 2005 by Judge Susan E. Bray in Guilford County District Court. Heard in the Court of Appeals 25 January 2007.

Office of the Guilford County Attorney, by Deputy County Attorney James A. Dickens, for Guilford County Department of Social Services, petitioner-appellant.

Smith, James, Rowlett & Cohen, L.L.P., by Margaret Rowlett, for Guardian ad Litem; and Legal Aid of N.C., by Attorney Advocate Lewis Pitts, for respondent-juvenile-appellee.

Nelson Mullins Riley & Scarborough LLP, by Matthew P. McGuire and Amy L. Keegan, for North Carolina Justice Center, Carolina Legal Assistance, and the Pulpit Forum of Clergy, Greensboro and Vicinity; and Charm M. Nichol, for Governor's Advocacy Council for Persons with Disabilities, Amici Curiae.

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Edelstein & Payne, by M. Travis Payne; and Sullivan & Worcester LLP, by Patrick P. Dinardo, Beth Jacobson, and Jennifer L. Sullivan, for First Star, Amicus Curiae.

Paul Meyer, for North Carolina Association of County Commissioners, Amicus Curiae.

JACKSON, Judge.

John C. (“the biological father”) and Willie G. (“the biological mother”) are the parents of the minor child J.G., who was born on 9 July 1990. The trial court terminated the biological father’s parental rights to J.G., and the biological mother subsequently married Tracy S. (“Tracy”) on 16 August 1991. On 15 December 1992, Tracy adopted J.G. as his son, and a week later, the biological mother and Tracy purchased a house from Habitat for Humanity (“the Habitat home”).

In April 1993, the biological mother abandoned Tracy and J.G., and on 27 August 1993, Tracy executed a will in which he devised all of his property—including the Habitat home—to a testamentary trust for J.G. Tracy also appointed his girlfriend, Connie Bell (“Bell”), as J.G.’s guardian and Dawson Deese (“Deese”), his uncle, as executor and trustee, with Bell as an alternate executrix and trustee.

On 5 November 1993, Tracy was granted both a divorce from bed and board from the biological mother and sole and exclusive permanent custody of J.G. The biological mother was divested of all rights in the Habitat home and was denied any visitation rights with J.G. On 14 January 1994, the trial court terminated the biological mother’s parental rights. On 3 February 1994, Tracy died.

On 18 March 1994, Bell was appointed J.G.’s general guardian. As Tracy’s legally adopted son, J.G. received Social Security benefits after Tracy’s death, and Bell was responsible for accounting for the Social Security checks, making the payments on the mortgage on the Habitat home (“the Habitat mortgage”), and taking care of the Habitat home. On 5 December 1994, Habitat for Humanity notified Bell, Deese, and the Clerk of the Guilford County Superior Court that Bell was delinquent in making the mortgage payments. On 17 January 1995, J.G.’s maternal uncle, George Jennings (“Jennings”), filed a petition to remove Bell as J.G.’s guardian, alleging that Bell had appropriated J.G.’s Social Security benefits to her own use. On 7 February 1995, Bell and Jennings entered into a consent order that provided for: (1) J.G. to continue residing with Bell; (2) Deese to be the payee

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for the Social Security benefits; and (3) Deese to make the mortgage payments to Habitat for Humanity.

On 3 October 1997, the Guilford County Department of Social Services (“DSS”) filed a petition to remove J.G. from Bell’s custody, alleging that Bell neglected J.G. and used improper physical discipline on him. J.G. told an employee of the Child Evaluation Clinic that Bell drank and abused him on a daily basis, whipping him with a belt, a coat hanger, and various other items. On 17 December 1997, the trial court adjudicated J.G. as neglected. The guardian *ad litem* did not agree to a reunification plan with Bell, and the trial court ordered J.G. to remain in the legal and physical custody of DSS pending further investigation.

On 6 February 1998, the guardian *ad litem* reported to the trial court that, notwithstanding Deese’s appointment as J.G.’s general guardian, Bell had resumed converting J.G.’s Social Security benefits to her own use as of the spring of 1997 and that no payments had been made on the Habitat mortgage since May 1997. The guardian *ad litem* recommended placing J.G. with a relative that was willing and able to assume custody of J.G. and reside at the Habitat home.

On 6 February 1998, the trial court ordered that DSS had the authority to place J.G. in the physical custody of his maternal aunt, Arnita Gibson (“Gibson”), and Gibson later informed DSS that she wanted to adopt J.G. Deese, meanwhile, died on 18 October 1998. On 14 May 1999, a social worker reported that J.G., who was in second grade at the time, was exhibiting behavioral problems at school, and on 9 February 2001, DSS again reported that J.G. was exhibiting behavioral problems at home and at school. On 3 August 2001, DSS reported that J.G. was doing better in school, both behaviorally and academically. During the time J.G. was in DSS custody, DSS paid the mortgage on the Habitat home where Gibson and J.G. resided.

On 18 March 2003, Gibson adopted J.G. and court supervision ceased. Thereafter, Gibson became the representative payee for J.G.’s Social Security benefits, which totaled approximately \$571.00 per month. Gibson also received an adoption subsidy of approximately \$500.00 per month. The monthly payment on the Habitat mortgage was approximately \$221.00.

On 11 December 2003, J.G. was adjudicated delinquent for one count of misdemeanor stolen property, one count of simple assault,

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and one count of second-degree trespass. On 1 March 2004, the trial court placed J.G. on probation for twelve months. On 20 April 2004, Gibson filed a juvenile petition stating that J.G. ran away from home for a period of more than twenty-four hours. On 22 April 2004, a motion for review was filed after J.G. violated the terms of his probation. The court appointed a guardian *ad litem* on 26 April 2004 and ordered DSS to determine whether a dependency petition should be filed on J.G.'s behalf. On 20 May 2004, J.G. was placed in a group home, and on 27 May 2004, the guardian *ad litem* reported that J.G. did not wish to return to his adoptive mother's home. Specifically, J.G. stated that (1) his aunt put him out on the front porch every morning at 4:00 a.m.; (2) he did not have clothes that fit him; (3) he did not get along with his aunt's boyfriend; and (4) he believed that his aunt only wanted his money. The guardian *ad litem* also reported that J.G. was concerned both about the condition of the Habitat home and that it could be taken away as a result of delinquent mortgage payments.

On 26 July 2004, J.G. again was placed into DSS custody, and the trial court ordered DSS to investigate the status of J.G.'s estate and the best way to preserve it for him. While J.G. was in DSS custody, Gibson and her boyfriend continued to live in the Habitat home. On 28 March 2005, while J.G. still was in the custody of DSS, Gibson relinquished her parental rights to J.G. Thereafter, Gibson and her boyfriend abandoned the Habitat home, which fell into a state of disrepair and was vandalized.

On 5 October 2005, the trial court adjudicated J.G. dependent and ordered that he remain in the legal and physical custody of DSS. Thereafter, DSS became the representative payee of J.G.'s Social Security benefits. DSS made no payments toward the Habitat mortgage. Instead, DSS applied those funds, which amounted to approximately \$538.00 per month, toward the cost of J.G.'s foster care, which amounted to approximately \$1,300.00 per month for room and board at a therapeutic foster home. In 2005, the Habitat home was valued at approximately \$80,000.00, and Habitat for Humanity held the outstanding mortgage of approximately \$27,000.00. Because the mortgage was not being paid, Habitat for Humanity initiated foreclosure proceedings.

On 23 November 2005, the guardian *ad litem* filed a motion to protect J.G.'s reasonably foreseeable needs. By order filed 20 December 2005, the trial court found that DSS's use of J.G.'s Social Security benefits to reimburse itself, rather than make the

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\$221.00 monthly Habitat mortgage payment, had not been reasonable. The court reasoned that J.G. will need the Habitat home as a residence when he turns eighteen years old and ages out of the foster care system. The court ordered DSS to use a portion of J.G.'s Social Security benefits to pay: (1) the monthly mortgage on his home; (2) \$2,800.00 for the past-due mortgage payments on the house;¹ and (3) \$1,000.00 for repairs to the house. On 21 December 2005, DSS filed notice of appeal.

[1] Preliminarily, we note that both parties agree that the 20 December 2005 order from which DSS appeals is an interlocutory order. They disagree, however, as to whether the "substantial right" exception applies in the instant case.

" 'An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.' " *Davis v. Davis*, 360 N.C. 518, 524, 631 S.E.2d 114, 119 (2006) (quoting *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)). "Generally, a party cannot immediately appeal from an interlocutory order unless failure to grant immediate review would 'affect[] a substantial right' pursuant to [North Carolina General Statutes,] sections 1-277 and 7A-27(d)." *Id.* at 524, 631 S.E.2d at 119. "The burden is on the appellant to establish that a substantial right will be affected unless he is allowed immediate appeal from an interlocutory order." *Embler v. Embler*, 143 N.C. App. 162, 166, 545 S.E.2d 259, 262 (2001).

"The 'substantial right' test for appealability of interlocutory orders is that 'the right itself must be substantial and the deprivation of that . . . right must potentially work injury . . . if not corrected before appeal from final judgment.' " *Frost v. Mazda Motor of Am., Inc.*, 353 N.C. 188, 192-93, 540 S.E.2d 324, 327 (2000) (quoting *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990)). Our Supreme Court has "adopted the dictionary definition of 'substantial right': 'a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a [person] is entitled to have preserved and protected by law: a material right.' " *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (alteration in original) (quoting *Oestreicher v. Am. Nat'l Stores, Inc.*, 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976)).

1. Since no mortgage payment was made since January 2005, the past-due amount of \$2,800.00 accumulated while J.G. was in DSS custody.

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Here, the right is one of substance as opposed to form. First, the trial court's order required DSS to pay (1) \$2,800.00 to Habitat for Humanity to bring the Habitat mortgage to current status and (2) \$1,000.00 toward repairs of the Habitat home. Although this Court has held that an injunction on the use of funds may not rise to the level of a substantial right, *see Guy v. Guy*, 27 N.C. App. 343, 348, 219 S.E.2d 291, 295 (1975), a substantial right *may* be affected when a trial court orders the immediate payment of funds. *See, e.g., Harrell v. Harrell*, 253 N.C. 758, 761, 117 S.E.2d 728, 731 (1961); *Miller v. Henderson*, 71 N.C. App. 366, 368, 322 S.E.2d 594, 596 (1984); *see also State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 102 N.C. App. 809, 811-12, 403 S.E.2d 597, 599 (1991) (holding that an order denying the release of funds held in escrow, as opposed to an order "purport[ing] to determine who is entitled to the money," is interlocutory and does not affect a substantial right). However, this Court also has held that "no substantial right exists . . . [w]hen the *sole issue* is the payment of money pending the litigation." *Perry v. N.C. Dep't of Corr.*, 176 N.C. App. 123, 130, 625 S.E.2d 790, 795 (2006) (emphasis added). Nevertheless, the instant case affects more than just money; it also affects DSS's right to choose how to dispose of funds that it receives in its capacity as a representative payee properly designated by the Social Security Administration. Its right to use its discretion as representative payee is "a matter of substance as distinguished from [a] matter[] of form." *Oestreicher*, 290 N.C. at 130, 225 S.E.2d at 805. Accordingly, the trial court's order affects a substantial right.

After determining that the trial court's order affects a substantial right, we next must determine whether that right will be "lost absent immediate review." *McCutchen v. McCutchen*, 360 N.C. 280, 282, 624 S.E.2d 620, 623 (2006). In the case *sub judice*, the substantial right at issue will be lost if the trial court's order is not immediately reviewed. As DSS correctly contends in its brief, "[i]f DSS is not allowed to appeal until after the juvenile reaches majority age, DSS will never be able to recover the funds it was . . . required to pay pursuant to the Order." Specifically, DSS accurately notes that it "cannot sue the juvenile, because . . . he is not legally responsible for his own foster care costs. Neither can DSS sue the *Guardian Ad Litem*, because he or she only represents the juvenile and has not spent the money for its own purposes." Accordingly, as the trial court's 20 December 2005 order affects a substantial right that will be lost if not reviewed before final judgment, the instant appeal is properly before this Court.

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On appeal, DSS contends that the trial court: (1) lacked authority to order DSS to use J.G.'s Social Security benefits to pay the repair costs as well as the delinquent, current, and future mortgage payments on the Habitat home; (2) erred in concluding that DSS is the general guardian of J.G.; and (3) erred in its finding of fact speculating on the impact that might have resulted if both Gibson had been promptly served with the child support complaint and the court had been informed that she was receiving a \$500.00 adoption subsidy for J.G., on the grounds that this finding was not supported by competent evidence in the record.

[2] As a preliminary matter, we agree with the guardian *ad litem* that a resolution of DSS's second and third arguments is not necessary for a resolution of the instant appeal. Notwithstanding the trial court's finding that DSS functioned as J.G.'s general guardian and that, had DSS acted more diligently, Gibson may have been ordered to pay her adoption subsidy money toward J.G.'s cost of care, the trial court nevertheless ordered DSS in its capacity as J.G.'s representative payee to make payments on the Habitat mortgage on J.G.'s behalf. Specifically, the trial court "ordered that the Guilford County Department of Social Services is to use funds from [J.G.]'s social security benefits, *for which the Department is representative payee*, to pay the monthly mortgage on [J.G.]'s Habitat house" (Emphasis added). The pivotal issue on appeal is not whether the trial court erred in its findings with respect to guardianship or Gibson's adoption subsidy, but rather whether the trial court properly ordered DSS, as the representative payee of J.G.'s Social Security benefits, to make the payments on J.G.'s Habitat mortgage. Because a resolution of DSS's second and third arguments is not necessary for our resolution of the appeal, we decline to reach those issues. See, e.g., *Champs Convenience Stores, Inc. v. United Chem. Co., Inc.*, 329 N.C. 446, 452, 406 S.E.2d 856, 859 (1991); *State ex rel. Utils. Comm'n. v. S. Bell Tel. & Tel. Co.*, 326 N.C. 522, 528, 391 S.E.2d 487, 490 (1990).

[3] First, DSS contends that because federal law governs Social Security benefits, North Carolina state courts are preempted and therefore lack subject matter jurisdiction to enter orders affecting such benefits. We disagree.

"Federal preemption occurs when the federal government's regulation in an area is comprehensive. State action may be barred upon a showing of congressional intent to occupy the field and prohibit parallel state action." *Hatcher v. Harrah's N.C. Casino Co., L.L.C.*,

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151 N.C. App. 275, 278, 565 S.E.2d 241, 243 (2002) (internal quotation marks and citations omitted). However, as the United States Supreme Court has explained,

[w]e start with the premise that nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law. Concurrent jurisdiction has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule.

Charles Dowd Box Co., Inc. v. Courtney, 368 U.S. 502, 507-08, 7 L. Ed. 2d 483, 487 (1962).

Title 42 of the United States Code, as well as the regulations promulgated thereunder by the Social Security Administration, governs Social Security benefits. *See* 42 U.S.C. §§ 401 *et seq.*; 20 C.F.R. §§ 401.5 *et seq.* Pursuant to Title 42, section 405, “misuse of benefits by a representative payee occurs in any case in which the representative payee receives payment under this title for the use and benefit of another person and converts such payment, or any part thereof, to a use other than for the use and benefit of such other person.” 42 U.S.C. § 405(j)(9). The statute further provides that “[t]he Commissioner of Social Security may prescribe by regulation the meaning of the term ‘use and benefit’ for purposes of this paragraph.” *Id.* The Social Security regulations, in turn, state that “payments . . . to a representative payee have been used for the use and benefit of the beneficiary if they are used for the beneficiary’s current maintenance. Current maintenance includes cost[s] incurred in obtaining food, shelter, clothing, medical care, and personal comfort items.” 20 C.F.R. §§ 404.2040, 416.640.

In the instant case, DSS has been appointed representative payee of J.G.’s Social Security payments, and in that capacity, DSS has reimbursed itself for the cost of J.G.’s foster care. As such, DSS contends that it is using, and always has used, J.G.’s Social Security benefits for his “current maintenance” as defined by the federal regulations.

Notwithstanding mixed reviews,² DSS’s actions in the instant case have become a common practice by foster care agencies throughout the country:

2. *See, e.g.*, Patrick Gardner, Keffeler v. DSHS: *Picking the Pockets of America’s Neediest Children*, Youth L. News, July-Sept. 2002; Lorraine Ahearn, *At Eleventh Hour, Judge Saves Boy in Foreclosure*, Greensboro News & Rec., Dec. 18, 2005 (describing J.G.’s situation as “a story of uncommon cruelty, compounded by layer upon layer of

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As a part of revenue maximization strategies . . . , foster care agencies are engaged in the systemic practice of converting foster children's Social Security benefits into a source of state funds. The agencies identify foster children who are disabled or have deceased or disabled parents, apply for Social Security benefits on the children's behalf, and then take the children's benefits to reimburse foster care costs for which the children have no legal obligation. The states are using the Social Security benefits as a funding stream in order to reduce state expenditures rather than as a resource to address the children's unmet needs in the severely broken foster care system. Furthermore, the benefits are not being conserved to aid the children in their forthcoming and difficult transitions from foster care to independence.

Daniel L. Hatcher, *Foster Children Paying for Foster Care*, 27 Cardozo L. Rev. 1797, 1798-99 (2006) (footnotes omitted). Nevertheless, the United States Supreme Court upheld such a practice in *Washington State Dep't of Social & Health Services v. Guardianship Estate of Keffeler*, 537 U.S. 371, 154 L. Ed. 2d 972 (2003). Specifically, the *Keffeler* Court addressed whether a foster care agency's practice of reimbursing itself violated the anti-alienability provision in the Social Security Act. See *Keffeler*, 537 U.S. at 375, 154 L. Ed. 2d at 979 ("The question here is whether the State's use of Social Security benefits to reimburse itself for some of its initial expenditures violates a provision of the Social Security Act protecting benefits from 'execution, levy, attachment, garnishment, or other legal process.' We hold that it does not." (internal citations omitted)). The issue in *Keffeler* was narrow, however,³ and *Keffeler* alone does not support DSS's preemption argument.

bureaucratic incompetence. And finally, no remorse from the only parent the boy, at age 15, has left—the Department of Social Services."). But see Tobias J. Kammer, Note, *Keffeler v. Department of Social and Health Services: How the Supreme Court of Washington Mistook Caring for Children as Robbing Them Blind*, 77 Wash. L. Rev. 877, 878 (2002) (arguing that social services entities "will not apply to act as representative payee if not permitted to use benefits for the child's current maintenance due to the application expenses").

3. We note that there may be viable constitutional objections to the practice employed by DSS in the instant case and used by similar state agencies throughout the country. See generally Hatcher, *supra*, at 1832-41 (discussing possible objections based upon procedural due process, equal protection, and the Takings Clause). The *Keffeler* Court acknowledged the existence of a procedural due process claim but declined to rule upon the issue. See *Keffeler*, 537 U.S. at 380 n.4, 154 L. Ed. 2d at 982 (declining to reach the issue because the Washington Supreme Court did not reach the argument, "accepted in the alternative by the trial court, that the department violated procedural due process by failing to provide notice of the 'intended result' of its appointment as

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Although this Court has held that a trial court does not have jurisdiction to direct the Social Security Administration to make payments to someone other than the beneficiary or representative payee, *see Brevard v. Brevard*, 74 N.C. App. 484, 488, 328 S.E.2d 789, 792 (1985),⁴ we note that “[t]he SSA [Social Security Administration] does not resolve disputes between a payee and a beneficiary concerning the use of benefits.” *Jahnke v. Jahnke*, 526 N.W.2d 159, 163 (Iowa 1994). As a result, several courts have held that state courts have concurrent jurisdiction to hear disputes between a representative payee and a beneficiary concerning the use of Social Security funds. *See, e.g., id.* (“Although the federal government may prosecute a payee who converts a beneficiary’s funds, there is no federal mechanism to prevent such a conversion from occurring. Moreover, once the SSA pays the benefits to the proper representative payee, it has no liability to the beneficiary for misuse of the payments.”); *Ecolono v. Div. of Reimbursements*, 769 A.2d 296, 305 (Md. Ct. App. 2001) (“[W]e find nothing in federal law to indicate an intent by Congress to limit interested parties to the federal administrative and judicial review process and to prohibit State courts from exercising jurisdiction, in the case before us, when the relief requested is not the removal of the payee but a reallocation of the benefits.”); *In re Kummer*, 93 A.D.2d 135, 159 (N.Y. App. Div. 1983) (“[T]he Federal Government has no interest in the funds properly paid to the DSS and it has no power to inquire into their expenditure other than to ascertain whether to make future payments to the DSS as representative payee. It lacks the power to determine disputes between the representative payee and the beneficiary as to the propriety of expenditures of benefits held in trust by

representative payee”). However, because such constitutional arguments were not raised at trial, we do not pass upon them on appeal. *See State v. Deese*, 136 N.C. App. 413, 420, 524 S.E.2d 381, 386 (holding that this Court will not consider constitutional arguments neither asserted nor determined in the trial court), *appeal dismissed and disc. rev. denied*, 351 N.C. 476, 543 S.E.2d 499 (2000).

4. Although the *Brevard* Court also held that the trial court had no jurisdiction to order the representative payee, who was the father of the beneficiaries, to pay over to the mother of the beneficiaries any part of the Social Security benefits he received as representative payee, the holding was based upon Title 42, section 407(a) of the United States Code. *See Brevard*, 74 N.C. App. at 487-88, 328 S.E.2d at 792 (citing 42 U.S.C. § 407(a)). As discussed *infra*, however, section 407(a) applies only to actions brought by claimants or creditors. In *Brevard*, the action was brought by the mother for an accounting of the Social Security benefits, based upon a prior trial court order directing the father to send the children’s Social Security checks to the mother as child support. *See id.* at 486, 328 S.E.2d at 791. The case *sub judice* is distinguishable as the action was brought by the guardian *ad litem* and not a claimant to the Social Security benefits. Therefore, the trial court here, unlike the court in *Brevard*, did not violate section 407(a).

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the former because it has no interest in those funds.” (footnotes omitted)); *Catlett v. Catlett*, 561 N.E.2d 948, 953 (Ohio Ct. App. 1988) (“We find that the case at bar involves an issue, *i.e.*, the representative payee’s expenditure of benefits, which is neither an initial determination nor a determination which is not an initial determination as defined by the federal regulations. Jurisdiction over this particular issue has not been exclusively granted to the federal courts by express provision.”). *But see Deweese v. Crawford*, 520 S.W.2d 522, 526 (Tex. Ct. App. 1975) (holding that any dispute between parents and payee as to use of dependent’s Social Security benefits must be resolved through federal administrative process), *overruled on other grounds by Cherne Indus., Inc. v. Magallanes*, 763 S.W.2d 768, 772 (Tex. 1989).

In *Jahnke v. Jahnke*, the Iowa Supreme Court, in determining that the state court possessed concurrent jurisdiction in a dispute between a representative payee and an adoptive parent of the beneficiary, noted that “[t]he assumption of state court jurisdiction is based in part on the *state’s interest in the welfare of children residing within its borders*.” *Jahnke*, 526 N.W.2d at 163 (emphasis added). Similarly, in the instant case, the guardian *ad litem*, acting on behalf of J.G., disputed DSS’s use of J.G.’s Social Security funds, and the trial court found that DSS’s use of the funds was not in J.G.’s best interests. Under our Juvenile Code,

[t]he duties of the guardian ad litem program shall be to make an investigation to determine the facts, the needs of the juvenile, and the available resources within the family and community to meet those needs; . . . to report to the court when the needs of the juvenile are not being met; and to protect and promote the best interests of the juvenile until formally relieved of the responsibility by the court.

N.C. Gen. Stat. § 7B-601 (2005). Additionally, “[i]t is the duty of the court to give each child before it such *attention, control and oversight* as is in the best interest of the child and the state.” *In re Cusson*, 43 N.C. App. 333, 337, 258 S.E.2d 858, 860 (1979) (emphasis added) (citing *In re Eldridge*, 9 N.C. App. 723, 724, 177 S.E.2d 313, 313 (1970)). Here, both the guardian *ad litem* and the trial court acted consistently with their supervisory roles in seeing to J.G.’s best interests, and J.G.’s best interests were central to the court’s order, which noted that if Habitat for Humanity foreclosed on the Habitat home, J.G. would receive very little money from the sale and would be homeless when he aged out of foster care. *See generally* Michele

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Benedetto, *An Ounce of Prevention: A Foster Youth's Substantive Due Process Right to Proper Preparation for Emancipation*, 9 U.C. Davis J. Juv. L. & Pol'y 381, 386-89 (2005) (discussing the troubling prevalence of homelessness among former foster care youth). Although DSS implies that it is always proper for it to reimburse itself for the cost of J.G.'s care using J.G.'s Social Security funds, even the Department of Social and Health Services in *Keffeler* acknowledged that it was not always appropriate to use all of a juvenile's Social Security funds to reimburse itself, in particular in anticipation of "impending emancipation." *Keffeler*, 537 U.S. at 378-79, 154 L. Ed. 2d at 981-82 ("The department occasionally departs from this practice, . . . [a]nd there have . . . been exceptional instances in which the department has foregone reimbursement for foster care to conserve a child's resources for expenses anticipated on impending emancipation.").

In accordance with the greater weight of authority, "[w]e agree with those courts that allow state courts to look into the expenditure of dependent social security benefits when an interested party questions the propriety of those expenditures." *Jahnke*, 526 N.W.2d at 163. Further, the trial court properly exercised jurisdiction as part of its supervisory role over J.G., a "child subject to its jurisdiction." *Eldridge*, 9 N.C. App. at 724, 177 S.E.2d at 313. Accordingly, DSS's assignment of error with respect to subject matter jurisdiction is overruled.

[4] DSS next contends that the trial court's order violated the anti-alienability provision of the Social Security Act, codified at section 407(a) of Title 42 of the United States Code. We disagree.

"In general, Social Security benefits are neither assignable nor subject to legal process." *Brevard*, 74 N.C. App. at 487, 328 S.E.2d at 791 (citing 42 U.S.C. § 407 and *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 34 L. Ed. 2d 608 (1973)). Specifically,

[t]he right of any person to any future payment under this title [42 U.S.C. §§ 401 *et seq.*] shall not be transferable or assignable, at law or in equity, and *none of the moneys paid or payable* or rights existing under this title *shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.*

42 U.S.C. § 407(a) (emphases added). In the instant case, DSS contends that by entering the order directing DSS to make J.G.'s mort-

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gage payments, the trial court subjected J.G.'s Social Security benefits to "legal process" in violation of Title 42, section 407(a) of the United States Code.

In *Keffeler*, the United States Supreme Court declined to provide a comprehensive definition of "other legal process" but explained that

"other legal process" should be understood to be process much like the processes of execution, levy, attachment, and garnishment, and at a minimum, would seem to require utilization of some judicial or quasi-judicial mechanism, though not necessarily an elaborate one, by which control over property passes from one person to another in order to discharge or secure discharge of an allegedly existing or anticipated liability.

Keffeler, 537 U.S. at 385, 154 L. Ed. 2d at 985. Using the guidance set forth by the Supreme Court in *Keffeler*, we must determine whether the trial court's 20 December 2005 order constitutes "other legal process" with respect to the alienation of J.G.'s Social Security benefits.

In interpreting section 407(a), we first note that legislative intent controls the construction of a statute. *See Fid. & Deposit Co. v. Arenz*, 290 U.S. 66, 69, 78 L. Ed. 176, 178 (1933). As our Supreme Court has explained, "in ascertaining this [legislative] intent, a court must consider the act as a whole, weighing the language of the statute, its spirit, and that which the statute seeks to accomplish." *Shelton v. Morehead Mem'l Hosp.*, 318 N.C. 76, 81-82, 347 S.E.2d 824, 828 (1986).

Although DSS in the case *sub judice* contends that the trial court's order directing DSS to make payments on the Habitat mortgage constitutes "legal process" and violates section 407(a), DSS's "interpretation of 42 U.S.C. § 407 takes the statute out of context and is an improper attempt to fashion a shield into a sword to be used against the intended beneficiary of the law." *In re French*, 20 B.R. 155, 156 (Bankr. D. Or. 1982). It is well-settled that "Congress in enacting 42 U.S.C. § 407 sought to protect Social Security payments which benefit the poor and needy from seizure in legal process against the beneficiaries. Section 407 deals with the rights of social security recipients and seeks to protect their benefits from the reach of creditors." *In re Greene*, 27 B.R. 462, 464 (Bankr. E.D. Va. 1983) (internal citation omitted); *see also Lee v. Schweiker*, 739 F.2d 870, 874 (3d Cir. 1984) (noting that the purpose underlying section 407(a) "is to pro-

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protect recipients from losing benefits to creditors"). As such, several state courts have discussed section 407(a) as a limitation upon creditors' rights, *see, e.g., In re Estate of Vary*, 258 N.W.2d 11, 17-18 (Mich. 1977), *cert. denied sub nom., Ivy v. Mich. Dep't of Treasury*, 434 U.S. 1087, 55 L. Ed. 2d 793 (1978); *First Nat'l Bank & Trust Co. v. Arles*, 816 P.2d 537, 539 (Okla. 1991), and "[c]ourts have uniformly recognized that the purpose of section 407(a) is to protect social security beneficiaries and their dependents from the *claims of creditors*." *Fetterusso v. New York*, 898 F.2d 322, 327 (2d Cir. 1990) (emphasis added) (citations omitted). Indeed, the anti-alienability provision "speaks throughout in terms of the rights of social security recipients . . . and the protection of their *benefits* from the *reach of creditors*." *Rowan v. Morgan*, 747 F.2d 1052, 1055 (6th Cir. 1984) (third emphasis added) (quoting *Neavear v. Schweiker*, 674 F.2d 1201, 1205 (7th Cir. 1982)). We note, however, that "[Section] 407 does not refer to any 'claim of creditors'; it imposes a broad bar against the use of any legal process to reach all Social Security benefits." *Keffeler*, 537 U.S. at 382, 154 L. Ed. 2d at 985 (quoting *Philpott*, 409 U.S. at 417, 34 L. Ed. 2d at 611-12). Nevertheless, the focus of section 407(a) is to protect Social Security beneficiaries against *claimants* to Social Security benefits, whether or not such claimants are creditors. *See Philpott*, 409 U.S. at 417, 34 L. Ed. 2d at 612 (noting that section 407 "is broad enough to include all claimants, including a State"). The congressional intent that section 407(a) protect Social Security beneficiaries against actions brought against them is reflected further in the House Conference Report on the Supplemental Security Income legislation:

"[I]f the benefits which would be provided under this program are to meet the most basic needs of the poor, the benefits must be protected from seizure in *legal processes against the beneficiary*. Therefore, any amounts paid or payable under this program would not be subject to levy, garnishment, or other legal process, except the collection of delinquent Federal taxes. Also, entitlement to these benefits would not be transferable or assignable."

Kerlinsky v. Commonwealth, 459 N.E.2d 1240, 1241-42 (Mass. App. Ct. 1984) (quoting 1972 U.S.C.C.A.N. 5142) (emphasis added)). Therefore, we hold that the anti-alienability provision functions as a bar against actions for Social Security benefits brought against Social Security beneficiaries and payees. *See Metz v. Metz*, 101 P.3d 779, 784 (Nev. 2004) ("Under 42 U.S.C. § 407, Congress has ex-

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pressly exempted all Social Security benefits from legal process *brought by any creditor*, including attachment, garnishment, levy or execution” (emphasis added)); *see also Commonwealth ex rel. Morris v. Morris*, 984 S.W.2d 840, 841 (Ky. 1998) (“The patent intent of this statute is to *prohibit creditors from asserting claims* upon SSI funds that take precedence over the SSI recipient’s rights to such funds.” (emphasis added)).

This holding comports with the statutory language as well as the Supreme Court’s decision in *Keffeler*. The statute provides that Social Security funds “shall [not] be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.” 42 U.S.C. § 407(a). The *Keffeler* Court further noted that “ ‘other legal process’ should be understood to be process much like the processes of execution, levy, attachment, and garnishment.” *Keffeler*, 537 U.S. at 385, 154 L. Ed. 2d at 985. “These legal terms of art refer to formal procedures by which one person gains a degree of control over property otherwise subject to the control of another, and generally involve some form of judicial authorization.” *Id.* at 383, 154 L. Ed. 2d at 984. In the instant case, no other person or entity gained control over J.G.’s funds; DSS continued, as representative payee, to control the funds, but merely was directed by the court in its supervisory role to use a portion of the funds to keep J.G.’s mortgage current—an action intended for the direct benefit of J.G.

Furthermore, the actions listed in section 407(a) typically are brought by creditors or other claimants. *See, e.g., Black’s Law Dictionary* 609 (8th ed. 2004) (defining “execution” as the “[j]udicial enforcement of a money judgment, [usually] by seizing and selling the judgment debtor’s property”); *id.* at 926 (defining “levy” as the taking or seizing of “property in execution of a judgment” and providing as an example the phrase, “the judgment creditor may levy on the debtor’s assets”); *id.* at 136 (defining “attachment” as a “the seizing of a person’s property to secure a judgment or to be sold in satisfaction of a judgment”); *id.* at 702 (defining “garnishment” as “[a] judicial proceeding in which a creditor (or potential creditor) asks the court to order a third party who is indebted to or is bailee for the debtor to turn over to the creditor any of the debtor’s property (such as wages or bank accounts) held by that third party”).⁵ Here, there is no creditor, nor is there any claimant.

5. *See Keffeler*, 537 U.S. at 383, 154 L. Ed. 2d at 984-85 (using legal dictionary definitions for “garnishment” and “attachment”).

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In the case *sub judice*, the guardian *ad litem* filed a motion to protect J.G.'s reasonably foreseeable needs, and based upon this motion, the trial court entered its order directing DSS, *inter alia*, to use a portion of J.G.'s Social Security benefits to keep current the mortgage on the Habitat home. As discussed *supra*, the legislative intent underlying section 407(a) is to protect Social Security beneficiaries from actions brought by creditors or other claimants. Such was not the case here, and therefore, section 407(a) is inapplicable.⁶ Accordingly, DSS's assignment of error is overruled.

Affirmed.

Judges CALABRIA and GEER concur.

ADAMS CREEK ASSOCIATES, A NORTH CAROLINA LIMITED PARTNERSHIP WITH BILLY DEAN BROWN, GENERAL PARTNER, PLAINTIFF v. MELVIN DAVIS AND LICURTIS REELS, DEFENDANTS

No. COA07-134

(Filed 6 November 2007)

1. Appeal and Error— preservation of issues—trial judge not ruling on motion—no argument that ruling required

The issue of whether the trial court erred by refusing to rule on a motion to set aside another judge's order was not preserved for appeal where defendants did not argue that the trial court was required to rule on their motion. If it had been, the trial court did not err by refusing to entertain the motion.

2. Judges— one judge overruling another—Rule 60 motion

Although defendants argue that the general rule barring one superior court judge from overruling another does not apply because their motion should be construed as having been brought under Rule 60, defendant's motion was not in fact brought under that section, defendants did not seek to amend the motion, and

6. Several courts have explained that because section 407(a) functions as a protection for Social Security beneficiaries, beneficiaries may waive that statutory protection. *See, e.g., In re Gillespie*, 41 B.R. 810, 812 (Bankr. D. Colo. 1984) (noting that a debtor may waive the protections afforded him by section 407(a)); *Matavich v. Budak*, 447 N.E.2d 1311, 1312-13 (Ohio Ct. App. 1982) (same). Because we hold that section 407(a) does not apply, we need not decide whether section 407(a) may be waived.

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defendants never raised this argument at trial. Moreover, if it was a Rule 60 motion, it was not timely.

3. Statutes of Limitation and Repose— limitations—Torrens Act registration

Defendants' motion involving the application of the Torrens Act in a 1979 proceeding was not timely under either the one-year statute of limitations of N.C.G.S. § 43-26 or the three-year statute of limitations of N.C.G.S. § 1-52(9).

4. Real Property— Torrens registration—service not properly obtained on one heir—no challenge by that heir

Although defendants in an action involving a Torrens property registration argued that the decree of registration was not valid because one of the heirs was not properly served, defendant did not cite any cases holding that the failure to notify another party, not the defendants themselves, voids a decree of registration that is not being challenged by the heir who allegedly was not notified. Furthermore, defendants are attempting to raise issues that have already been adjudicated.

5. Appeal and Error; Attorneys—appealability— motion to disqualify attorney denied

The trial court's denial of defendants' motion to disqualify plaintiff's attorney was interlocutory and not subject to appeal where only a partial summary judgment had been granted on the underlying action. However, if the issue had been addressed, it is clear that the trial court did not abuse its discretion. The earlier action from which the alleged conflict of interest arose was not relitigated in the hearing giving rise to the orders from which defendants here appealed.

6. Contempt— civil and criminal—different acts

Defendants were found in civil and criminal contempt on the basis of different acts: they were found in civil contempt for failing to comply with an earlier order not to trespass, and in criminal contempt for threatening to disobey future orders.

7. Contempt— penalties—testimony of intended refusal to obey order

The trial court did not err by imposing penalties for indirect criminal contempt where the defendants testified in the court's presence that they would not obey the orders of the court. This constituted direct contempt; however, the penalty is the same for

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both direct and indirect criminal contempt, and defendants were afforded the assistance of counsel and the opportunity to testify and explain why they continued to trespass on the property.

8. Contempt— refusal to leave property—future arrest and bond

The trial court did not abuse its discretion in a trespass action where defendants testified that they would not leave the property and the court issued an order that defendants would be taken into custody if they were again found on the property. The court did not impose a sentence or recommit defendants, but provided that they must post a \$500 bond before being released from custody if they were again arrested for violating orders to stay off the property.

Appeal by defendants from orders entered 10 August 2006 by Judge Gary E. Trawick in Carteret County Superior Court. Heard in the Court of Appeals 29 August 2007.

Wheatly, Wheatly, Weeks & Lupton, P.A., by Claud R. Wheatly, III, for plaintiff-appellee.

UNC Center for Civil Rights, by Julius L. Chambers and Anita S. Earls, for defendant-appellants.

Annette Hiatt for Amicus Curiae Land Loss Prevention Project.

SMITH, Judge.

Defendants, Melvin Davis and Licurtis Reels, appeal from orders entered in connection with claims for trespass and to remove cloud from title filed by plaintiff, Adams Creek Associates. The subject property, upon which defendants admittedly have entered and lived, consists of some 13 acres of waterfront land in Carteret County, North Carolina. Defendants appeal from orders denying their motions to disqualify plaintiff's attorney and to set aside a 1979 decree of registration for the subject property, and from an order finding them in contempt of court. Defendants also purport to appeal from the trial court's refusal to rule on their motion to set aside an order entered by another Carteret County Superior Court Judge. We affirm.

The relevant history of this action is summarized as follows: In 1911 Elijah Reels bought approximately 65 acres in Carteret County. The record documents do not describe the boundaries of this 65-acre tract by metes and bounds, but instead by reference to local land-

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marks such as Adams Creek; “the county road”; and the names of adjoining property owners. In January 1944, this 65-acre tract was sold to Carteret County for back taxes. In February 1944, Elijah’s brother, Mitchell Reels (“Mitchell”), bought the 65-acre property by paying the taxes that were owed. Mitchell Reels died intestate in 1971, survived by his wife Pernella Reels and his eleven children or their heirs. In 1976, Mitchell’s daughter Gertrude Reels (“Gertrude”) filed an action pertaining to the property rights of Mitchell’s heirs. The trial court entered judgment in August 1976, ruling that Mitchell’s heirs owned: (1) the 65 acres that Mitchell bought in 1944 for back taxes; and (2) another lot comprising 45 acres. This 45-acre tract was also described by reference to local landmarks, including “the Miles Jones lands”; the “lands of Elijah Reels”; “the county road”; and “the Fannie Moore and Wright Sutton properties.”

In 1978, Shedrick Reels (“Shedrick”) filed a petition under N.C. Gen. Stat. § Chapter 43, also known as the Torrens Law, in which he sought to have the subject property registered in his name, based on a conveyance of the land from Elijah Reels to him. The documents in this record describe the subject property in metes and bounds, unlike the less precise references to adjoining landowners and the “county road” used to describe Mitchell’s lots. Accordingly, it is not possible from the record to discern the relative locations of the three tracts (Mitchell’s 65-acre and 45-acre tract, and the subject property registered by Shedrick), from their descriptions.

Defendants assert that the subject property is located entirely within Mitchell’s 65-acre lot, and that the 1976 judgment proves that Elijah Reels had no interest in the subject property, and thus could not have validly conveyed it to Shedrick Reels. But, the 1976 judgment specifically refers to “the Elijah Reels lands.” The question of whether the subject property was originally part of the Elijah or Mitchell Reels lands is not answered in the record, which nowhere attempts to synthesize the disparate styles of description in order to set out the boundaries of the subject property in relation to Mitchell’s and Elijah’s properties.

In March 1979, attorney Claud R. Wheatly, III, (“Wheatly”) signed a certification on behalf of the present defendants or their predecessors in interest, certifying that they had no objections to Shedrick’s petition to register the subject property. On 19 March 1979, a decree of registration was filed declaring Shedrick to be the owner of the subject property. The decree further declared “the Heirs of Mitchell Reels, Deceased,” to be the owner of two tracts. The two tracts are

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set out in a metes and bounds description, the second tract specifically “containing approximately 3.64 acres all as shown on a survey on file in this proceeding of Shedrick Reels by James L. Powell, Surveyor, dated November 28, 1978[.]” Again, the record does not clarify the relationship or overlap, if any, between these two tracts and the 65- and 45-acre Mitchell tracts described in the earlier documents.

On 25 August 1982, Shedrick filed a trespass action against Melvin Davis, defendant in the instant case, and Gertrude Reels, mother of defendant Licurtis Reels. The complaint asserted that plaintiff Shedrick Reels “is the owner of the fee simple estate” of the subject property; that “[d]efendants claim some interest in [the subject property]; and that “defendants have committed and threatened to continue to commit acts of trespass thereon[.]” In an order filed 4 January 1984, Judge Herbert O. Phillips, III granted summary judgment for Shedrick, stating in pertinent part that:

IT IS THEREFORE ORDERED . . . that summary judgment is granted in favor of plaintiff against the defendant[s] and that the plaintiff is the owner of the lands described in the complaint and that defendants have no right or title to said lands.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that: 1. The defendants and their agents, servants, and employees shall not enter upon or commit any act of trespass upon the lands described in the complaint. . . .

On 20 September 1985, Judge David E. Reid found Melvin Davis in contempt of Judge Phillips’ order, stating in pertinent part:

. . . Melvin Davis, by his own admission, has been upon the [subject property] on many occasions since the Order of this Court dated November 4, 1983[, and filed 4 January 1984,] ordering him not to do so, that he ordered concrete to be poured for a boat ramp on the property since the order, has caused electric poles to be hooked up on the property to construct the building, and has otherwise committed acts of trespass;

. . .

The Court concludes as a matter of law that the defendant is in willful contempt of the order of this Court of November 4, 1983.

. . . IT IS ORDERED that the defendant is placed . . . in the Carteret County jail until he shall purge himself of contempt by

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signing a statement . . . acknowledging that the [subject property] belongs to plaintiff Shedrick Reels, and that he will not go upon the land for any purpose[.]

Pursuant to this order, Davis signed the following statement:

I, Melvin Davis, do hereby acknowledge that the land described in the complaint in this action belongs to the plaintiff Shedrick Reels, and I will not go upon the land for any purpose[.]

Significantly, no appeal was taken from either Judge Phillips' order filed in January 1984 or from Judge Reid's order finding defendant in contempt of Judge Phillips' order. In 1985, Shedrick sold the subject property to buyers, who in turn conveyed the property to plaintiff in 1986.

On 30 October 2002, plaintiff herein filed the instant action against defendants. Plaintiff alleged that defendants continued to claim an interest in and trespass upon the subject property, and sought removal of the cloud on its title and damages for trespass. Defendants answered, denying the material allegations of the complaint and asserting a counterclaim for title to the subject property. Defendant Melvin Davis later filed an additional answer asserting various defenses and seeking dismissal of plaintiff's action. Plaintiff answered the counterclaim and denied its allegations. On 14 May 2004, plaintiff filed a motion for summary judgment. On 16 September 2004, Judge Benjamin G. Alford entered partial summary judgment for plaintiff, in an order finding in pertinent part:

1. The Plaintiff's title in this matter originates as a result of a Chapter 43 ([T]orrens proceeding) which was filed with the Clerk of Superior Court of Carteret County[.] . . . The Petitioner in said action was Shedrick Reels . . . and the Respondents consisted of various individuals one of whom being Gertrude Reels, mother of the Defendants.
2. A decree of registration was entered on or about 16 March 1979 and approved by the resident superior court judge on 19 March 1979 with the decree of registration being recorded in Book 4A, Page 241, Carteret County Registry.
- . . .
4. The property in the petition and the description as contained in the publication encompasses the property as set forth in the decree of registration.

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5. Pursuant to said decree of registration, Registered Certificate 79-1 was issued to Shedrick Reels describing the property which was set forth in the decree of registration and the same property as described in the complaint of the Plaintiff in this matter.

. . .

7. Shedrick Reels and wife, Beatrice Reels, conveyed to Monroe Johnson and Charles B. Bissette, Jr., d/b/a Adams Creek Development, by deed dated 27 November 1985, recorded in Book 529, Page 399, Carteret County Registry.
8. The said Monroe Johnson and Charles B. Bissette, Jr., d/b/a Adams Creek Development, by deed dated 8 September 1986 conveyed said property to Adams Creek Associates[.]
9. The Court further finds the Shedrick Reels brought an action against Melvin Davis and Gertrude Reels in the Superior Court of Carteret County . . . contending that Melvin Davis and Gertrude Reels were trespassing on the property of the Plaintiff, Shedrick Reels.
10. Order was entered on or about 4 November 1983 finding that Shedrick Reels was the owner of said property and that the defendants, their agents, servants or employees were not to enter upon or commit acts of trespass upon the lands described in the complaint.
11. That on or about September 20, 1985, Superior Court of Carteret County by order signed by The Honorable David E. Reid found that Melvin Davis should be held in contempt [for] violating the court order of November 4, 1983.
12. The Defendant, Melvin Davis, was given the opportunity to purge himself of the contempt by signing a statement drawn by Shedrick Reels' attorney.
13. Melvin Davis executed a statement wherein he acknowledged that the property belonged to Shedrick Reels and that he would not go upon the land for any purpose[.]
14. The Court further finds that Donald B. Pollock, Attorney at Law, filed a motion to set aside a Decree of Registration contending that one of the defendants in the original Chapter 43 proceeding (Torrens Proceeding) did not have proper serv-

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ice on Classy Reels Curley. The said motion is dated 28 October 1983 and nothing else appeared to show that she had taken any action involving said motion.

15. Melvin Davis has gone upon the property as described in the complaint in this cause contending that he had gotten a power of attorney from his mother in Classy's name to do what he wanted to do.
16. The Defendants have offered no affidavits from Licurtis Reels . . . nor introduced any further documentation other than the deposition of Melvin Davis.
17. The deed described in the complaint to Licurtis Reels . . . is within the property as described in the decree of registration and the Certificate of Title of Shedrick Reels and . . . constitutes a cloud on the title of the Plaintiff and is a nullity and should be stricken from the records of Carteret County.
18. It appears to the Court there is no genuine issue to any material fact and that the Plaintiff is entitled to a partial summary judgment as a matter of law and is granted summary judgment against the Defendants and the Plaintiff is the owner of the lands described in the complaint and the Defendants have no right or title to said lands.

IT IS FURTHER ORDERED . . . that the Defendants . . . will not enter upon or commit any act of trespass upon the lands described in said complaint and further, this action shall be tried by a jury on the issues of damages only.

Defendants filed notice of appeal on 13 October 2004, but failed to file a record on appeal or otherwise perfect the appeal, and on 9 March 2005 plaintiff moved to dismiss defendants' appeal. Attached to the motion was a certificate of service certifying that it had been served upon N. Jerome Willingham, defendants' counsel of record, and also upon each defendant. On 28 March 2005, Judge Kenneth F. Crow entered an order dismissing defendants' appeal from Judge Alford's order of 16 September 2004, and finding that:

. . . [the] Motion to Dismiss the Appeal of the Defendants was . . . served by regular mail, on attorney N. Jerome Willingham, attorney for the two (2) defendants, Melvin Davis and Licurtis Reels. . . . In addition thereto Melvin Davis and Licurtis Reels were served with a copy of said Motion by the sheriff of Carteret

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County on March 16, 2005. [Neither] the Defendant[']s attorney nor the Defendants appeared upon the call of this case.

On 6 May 2006, plaintiff filed a Show Cause motion, seeking to have defendants held in contempt of Judge Alford's order of September 2004. The motion asserted that defendants not only continued to trespass on the subject property, but also had not removed any of the buildings or personal property stored there. Plaintiff's motion was granted by Judge Ernest Fullwood on 7 July 2006, in an order directing defendants to appear and show cause why they should not be held in contempt of court.

On 17 May 2006, defendants filed a motion to set aside the dismissal of their appeal, a motion to disqualify Mr. Wheatly from representing plaintiff, and a motion asking the trial court to set aside the 1979 decree of registration for the subject property. On 7 August 2006, the Show Cause order and defendants' motions were brought before Judge Gary E. Trawick. Judge Trawick did not entertain defendants' motion to set aside Judge Crow's dismissal of their appeal, but invited defendants to file a motion for reconsideration with Judge Crow. On 10 August 2006, the court denied defendants' motions to disqualify Mr. Wheatly as plaintiff's counsel and to set aside the original decree of registration. On the same date the court entered an order (1) finding defendants in civil contempt of Judge Alford's 2004 order for continuing to trespass on the subject property; and (2) finding defendants in indirect criminal contempt of court for testifying under oath that they did not intend to obey future orders of the trial court to stay off the subject property. Defendants appealed from the trial court's denial of their motions to disqualify Mr. Wheatly and to set aside the decree of registration, and from the court's order for contempt.

[1] We first consider defendants' argument that the trial court erred by refusing to rule on its motion to set aside Judge Crow's dismissal of their appeal from Judge Alford's order of September 2004. We conclude that this issue is not properly before us.

At the hearing, the trial court and defense counsel had the following dialog about this motion:

[JUDGE TRAWICK]: Now, the court will not consider the motion to set aside the dismissal of the appeal which was signed by Judge Crow. Judge Crow is a local judge and I'm not going to consider another Superior Court Judge's order who is still active, on

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the bench and local. So you have to take that up directly with him if you want for that to be reconsidered.

[DEFENSE COUNSEL]: I understand.

Defendants did not object to the trial court's ruling on this issue. Under N.C. R. App. P. 10(b)(1):

In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion.

N.C. R. App. P. 10(b)(1) (2007). " 'This subsection of [Rule 10] . . . is directed to matters which occur at trial and upon which the trial court must be given an opportunity to rule in order to preserve the question for appeal. The purpose of the rule is to require a party to call the court's attention to a matter upon which he or she wants a ruling before he or she can assign error to the matter on appeal.' " *Reep v. Beck*, 360 N.C. 34, 37, 619 S.E.2d 497, 499-400 (2005) (quoting *State v. Canady*, 330 N.C. 398, 401, 410 S.E.2d 875, 878 (1991)). Defendants did not argue that the trial court was required to rule on their motion and, thus, did not preserve this issue for appeal pursuant to N.C. R. App. P. 10(b)(1). Accordingly, this issue is not properly before this Court. *Id.*

However, even if the issue had been preserved, we conclude the trial court did not err. "The power of one judge of the superior court is equal to and coordinate with that of another." *Michigan Nat'l Bank v. Hanner*, 268 N.C. 668, 670, 151 S.E.2d 579, 580 (1966). Therefore, it is well established in our jurisprudence "that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972). Thus, the trial court's refusal to entertain defendants' motion to set aside the order of another superior court judge was not error.

[2] Defendants argue that the general rule barring one superior court judge from overruling another does not apply in this case because their motion "is properly construed as having been brought pursuant

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to Rule 60(b)(5) or Rule 60(b)(6).” However, Defendants’ motion was not brought under N.C. Gen. Stat. § 1A-1, Rule 60; defendants never sought to amend their motion to cite Rule 60; and defendants never raised this argument at the trial level. Furthermore, defendants’ motion alleged in relevant part:

1. That on or about March 11, 2005, Judge W. Donald Stephens . . . issued an Order forbidding Jerome Willingham, defendants’ attorney at the time, from handling client funds until further order of the court.
2. Mr. Willingham was scheduled for a hearing before the State Bar Grievance Committee on April 22, 2005. He was subsequently disbarred.
3. . . . [C]ounsel for defendants knew or should have known that he was facing disciplinary problems before the State Bar, but never advised his clients of this fact. In fact, defendants did not become aware that they were no longer being represented by Mr. Willingham until they read it in the newspaper. . . .
4. This patent misrepresentation by Jerome Willingham, has caused a substantial hardship to the defendants and we call upon the court to rectify this inequity by setting aside the Order of Dismissal.

We note that defendants’ motion states that their attorney was not disbarred until after their appeal was dismissed. Further, a Rule 60 motion “shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken.” N.C. Gen. Stat. § 1A-1, Rule 60(b) (2006). Defendants’ motion was filed twenty months after entry of Judge Alford’s order and almost fourteen months after Judge Crow’s dismissal of their appeal, which is neither “within a reasonable time” nor within a year of Judge Crow’s order. Accordingly, even if we were to construe defendants’ motion as a Rule 60 motion, it was not timely. This argument is overruled.

[3] We next address defendants’ arguments that the trial court erred by granting summary judgment in favor of plaintiff, on the grounds that (1) “the Torrens Act, as applied in these circumstances, is an unconstitutional taking of property without due process” and (2) “one heir was not served with notice of the Torrens Act proceeding.” We conclude that neither of these issues is properly before us.

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Defendants noticed appeal from Judge Trawick's rulings on a motion to set aside the 1979 decree of registration; a motion to disqualify plaintiff's attorney from representing it; and a show cause order charging defendants with contempt of court. None of these motions were for summary judgment, and Judge Trawick did not grant summary judgment for any party.

Judge Alford did grant partial summary judgment for plaintiff in 2004. However, defendants' appeal from that order was dismissed in 2005 and defendants neither sought review of the dismissal before Judge Crow, nor filed a petition for certiorari. In short, Judge Alford's order remains in effect, is not on appeal, and not subject to our review. Accordingly, the propriety of Judge Alford's order granting partial summary judgment is not before us.

Presumably, defendants meant to argue that the trial court erred by denying their motion to set aside the 1979 decree of registration on the grounds that the application of the Torrens Act to those 1979 proceedings was improper. The trial court, however, denied defendants' motion to set aside the decree on the grounds that the statute of limitations had long expired. We agree.

N.C. Gen. Stat. § 43-26 provides, in part, that:

No decree of registration hereafter entered and no certificate of title hereafter issued pursuant thereto shall be adjudged invalid or revoked or set aside, unless the action or proceeding in which the validity of such decree or of the certificate of title issued pursuant thereto is attacked or called in question be commenced or the defense alleging the invalidity thereof be interposed within 12 months from the date of such decree.

N.C. Gen. Stat. § 43-26 (2006). In the instant case, the decree of registration was entered in 1979, and defendants' motion was not made until 2006, decades after the statute of limitations expired.

Defendants assert baldly that the one-year statute of limitations "does not apply in this case" because "the registration was based on a fraud that the heirs did not discover for several years." Defendants cite no cases holding that this would invalidate the relevant statute of limitations. Further, N.C. Gen. Stat. § 1-52(9) provides that "[f]or relief on the ground of fraud or mistake; the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." N.C. Gen. Stat. § 1-52(9) (2006). "For purposes of N.C.G.S. § 1-52(9), 'dis-

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covery' means either actual discovery or when the fraud should have been discovered in the exercise of 'reasonable diligence under the circumstances.' " *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, — (2007) (quoting *Bennett v. Anson Bank & Trust Co.*, 265 N.C. 148, 154, 143 S.E.2d 312, 317 (1965)). The record shows a defense motion was filed in 1983 seeking to set aside the decree of registration on the grounds of fraud and failure to notify an heir. Thus, defendants were aware of these issues by no later than 1983, yet filed their motion more than 20 years later.

Clearly, the trial court did not err by ruling that the one-year statute of limitations set out in N.C. Gen. Stat. § 43-26 had expired when defendants filed their motion. Further, assuming the existence of "fraud that the heirs did not discover for several years," the three-year statute of limitations for fraud was tolled well more than three years before their 2006 motion was filed. Accordingly, not only was defendants' motion late under the one-year statute of limitations, if we apply the three-year statute of limitations for fraud set out in N.C. Gen. Stat. § 1-52(9), defendants' motion was still filed decades too late.

[4] Defendants also argue that an heir, Classie Reels Curley, was not properly served with notice of the proceeding and, therefore, the trial court should have set aside the 1979 decree of registration. Defendants, however, do not cite any cases holding that the failure to notify another party, not the defendants themselves, voids a decree of registration that is not being challenged by the heir who allegedly was not notified. We further note that by challenging the denial of their motion to set aside the 1979 decree of registration, defendants are attempting to raise issues which have already been adjudicated. By orders filed 4 January 1984, Judge Herbert O. Phillips found that Shedrick was the owner of the subject property, that defendants had no interest in the subject property, and ordered defendants and others not to trespass on the land. By order dated 20 September 1985, Judge David E. Reid found defendant Melvin Davis, who had admitted being on the subject property, in contempt for violating the previous order. Finally, by order dated 14 September 2004, Judge Benjamin G. Alford found that defendants had no right or title to the subject property.

We have concluded that the trial court did not err by ruling that defendants' motion was barred by the statute of limitations. Inasmuch as the trial court denied defendants' motion, it was not called upon to rule on issues arising from the Torrens Act proceedings.

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Accordingly, the substantive merits of the 1979 litigation was neither before the trial court nor preserved for appellate review. The pertinent assignments of error are overruled.

[5] Defendants also argue that the trial court abused its discretion by failing to disqualify Claud R. Wheatly, III, from representing plaintiff in this matter. We disagree.

The North Carolina Supreme Court has held that the denial of a motion to disqualify counsel is an interlocutory order that may not be appealed until entry of a final judgment. *See Travco Hotels v. Piedmont Natural Gas Co.*, 332 N.C. 288, 420 S.E.2d 426 (1992). In *Travco*, the Court reviewed this Court's holding that a trial court's "order denying [defendant's] motion to disqualify [plaintiff's counsel] was not appealable" and held that "the Court of Appeals was correct." *Id.* at 291, 420 S.E.2d at 427-28. The Court explained:

This Court has consistently found "that no appeal lies to an appellate court from an interlocutory order or ruling of the trial judge unless such ruling or order deprives the appellant of a substantial right which he would lose if the ruling or order is not reviewed before final judgment." "Essentially a two-part test has developed—the right itself must be substantial and the deprivation of that substantial right must potentially work injury . . . if not corrected before appeal from final judgment."

Id. at 292, 420 S.E.2d at 428 (internal citations omitted). The Court further noted that "[Defendant] can adequately protect its right not to have its confidences used against it to its detriment by appealing any adverse final judgment." *Id.* at 293, 420 S.E.2d at 428.

In the instant case, the underlying action is plaintiff's 2002 trespass action against defendants. In his 2004 order entered in the trespass case, Judge Alford granted partial summary judgment, reserving the issue of damages for jury trial. The entry of summary judgment was therefore interlocutory and not a final order. We conclude that the trial court's denial of defendants' motion to disqualify Mr. Wheatly from representing plaintiff is not subject to review at this time. Accordingly, this argument is dismissed.

Were we to address this issue on its merits, however, it is clear that the trial court did not err by denying defendants' motion. "Decisions regarding whether to disqualify counsel are within the discretion of the trial judge and, absent an abuse of discretion, a trial

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judge's ruling on a motion to disqualify will not be disturbed on appeal." *Travco*, 332 N.C. at 295, 420 S.E.2d at 430.

In the instant case, Mr. Wheatly represented at least one member of the Reels family in 1979, in litigation over the ownership of the subject property. Consequently, if that issue were ever to be reopened in the future, there might exist a conflict of interest between Mr. Wheatly's prior representation of defendants and his present representation of the plaintiff. However, neither the 2002 trespass action nor the motions from which defendants have appealed involved relitigation of this question.

In 1979, plaintiff was declared the owner of the subject property, for which he filed a decree of registration. In 1983, summary judgment was entered on behalf of plaintiff in a trespass action against defendant Melvin Davis, and in 1985 Davis was found in contempt of court for violating the 1983 order. Neither the 1979 decree of registration, the 1983 order, nor the 1985 contempt order were appealed. Thus, the issue of the ownership of the subject property was resolved long before the present plaintiff filed its 2002 trespass action, and was not relitigated in the hearing giving rise to the orders from which defendants appeal.

Defendants argue that it was a conflict of interest for Mr. Wheatly to represent plaintiff when he previously represented one or more members of defendants' family. Defendants contend that Wheatly represented plaintiff "in what is essentially the continuation of a single matter regarding the proper ownership of the Reels family land." However, as discussed above, the issue of "the proper ownership" of the subject property was not relitigated at the trial level, and is not before us on appeal. This assignment of error is overruled.

[6] Finally, defendants argue that the trial court erred by finding them in both civil and criminal contempt, and by ordering them arrested "without further hearing by the court."

This Court has stated:

A contempt hearing is a non-jury proceeding. "The standard of appellate review for a decision rendered in a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment. Findings of fact are binding on appeal if there is competent evidence to support them, even if

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there is evidence to the contrary.” “The trial court’s conclusions of law drawn from the findings of fact are reviewable de novo.”

State v. Simon, 185 N.C. App. —, —, 648 S.E.2d 853, — (2007) (internal citations omitted). “ ‘The standard of review for contempt proceedings is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law.’ ” *Trivette v. Trivette*, 162 N.C. App. 55, 60, 590 S.E.2d 298, 302-03 (2004) (quoting *Sharpe v. Nobles*, 127 N.C. App. 705, 709, 493 S.E.2d 288, 291 (1997)). N.C. Gen. Stat. § 5A-23 provides in pertinent part that the burden of proof in a civil contempt hearing “shall be on the aggrieved party” and the trial court “is the trier of facts at the show cause hearing.” N.C. Gen. Stat. § 5A-23(a1) and (d) (2006).

In the instant case, defendants were charged with contempt of court for their continued trespass on the subject property following the entry of several court orders directing them not to trespass thereon. Both defendants testified in court that they had in fact been living on the subject property or otherwise trespassing on it. On this basis, the trial court found the defendants guilty of civil contempt, for failing to comply with an order of the court. In addition, both defendants testified in court that they intended to return to the subject property, even if that violated a court order, and that they would not follow future court orders directing them to vacate the property. On the basis of this testimony, the trial court found the defendants guilty of indirect criminal contempt.

Defendants argue that they were found in civil and criminal contempt for the same behavior, in violation of N.C. Gen. Stat. § 5A-21(c) and 5A-23(g), which prohibit finding a defendant in both civil and criminal contempt for the same behavior. As discussed above, defendants were found in civil contempt for failing to comply with the court’s 2004 order, and were found in criminal contempt for their testimony threatening to disobey future orders of the court. Thus, defendants were found in civil and criminal contempt on the basis of different acts.

[7] Defendants next argue that the trial court erred in imposing indirect criminal penalties. “ ‘[C]riminal [contempt] proceedings are those brought to preserve the power and to vindicate the dignity of the court and to punish for disobedience of its processes or orders.’ ” *State v. Reaves*, 142 N.C. App. 629, 633, 544 S.E.2d 253, 256 (2001) (quoting *Galyon v. Stutts*, 241 N.C. 120, 123, 84 S.E.2d 822, 825

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(1954)). “Direct criminal contempt is ‘committed within the sight or hearing of a presiding judicial official[,]’ N.C. Gen. Stat. § 5A-13(a)(1) (2005), while indirect criminal contempt ‘arises from matters not occurring in or near the presence of the court, but which tend to obstruct or defeat the administration of justice.’ ” *State v. Simon*, 185 N.C. App. —, — 648 S.E.2d 853, — (2007) (quoting *Atassi v. Atassi*, 122 N.C. App. 356, 361, 470 S.E.2d 59, 62 (1996)).

In the instant case, defendants testified in the trial court’s presence, constituting direct criminal contempt. However, the trial court mistakenly held them in indirect criminal contempt:

The testimony of the Defendants stating that they are not going to obey the orders of the court is disrespectful and disparages the respect due to the court and its orders.

We conclude that this misnomer is not grounds for reversal. The penalty is the same for both direct and indirect criminal contempt. Defendants were afforded the assistance of counsel and the opportunity to testify and explain why they continued to trespass on the subject property. We conclude that the trial court did not err by finding defendants in both civil and criminal contempt.

[8] Defendants also argue that the order finding them in contempt is erroneous in that it provides that if they are again found on the subject property, they “will be taken into custody until the next session of Superior Court to show cause [why] they shall not be held in contempt again.” Defendants assert that this order violates N.C. Gen. Stat. § 5A-21(b2), which states that before the Court may recommit a civil contemnor, the defendant is entitled to a *de novo* hearing. In the order *sub judice*, the trial court does not impose a sentence or “recommit” the defendants. Rather, the order provides that, if defendants are again arrested for violation of the several orders directing them to stay off the subject property, they must post a \$500 bond before being released from custody. Defendants do not argue that this bond is inappropriate or excessive, and we find it well within the trial court’s discretion. This assignment of error is overruled. For the reasons discussed above, we conclude that the trial court did not err and that its orders should be

Affirmed.

Judges McGEE and STEPHENS concur.

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IN THE MATTER OF: R.L. AND N.M.Y., MINOR CHILDREN

No. COA06-1616

(Filed 6 November 2007)

1. Child Abuse and Neglect— review of reunification efforts—hearings continued—abuse of discretion

The trial court abused its discretion by continuing hearings for a dependent juvenile multiple times in a manner inconsistent with N.C.G.S. § 7B-803. The trial court's violations of the time limits set out in N.C.G.S. §§ 7B-801(c) and 7B-906(a) were not justified.

2. Child Abuse and Neglect— adjudicatory orders—statutory timelines

The trial court violated the statutory time limit found in N.C.G.S. § 7B-807(b) concerning adjudicatory orders in juvenile proceedings. The reason for the delay is not clear from the record.

3. Child Abuse and Neglect— adjudication orders—hearings to explain delays—effective date of statute

The statute concerning subsequent hearings to explain delays in adjudication orders in juvenile proceedings, N.C.G.S. § 7B-807(b), became effective on 1 October 2005 and does not apply to petitions filed before that date.

4. Child Abuse and Neglect— review hearing—delay prejudicial

A mother sufficiently demonstrated that she was prejudiced by the court's delay in conducting her review hearing after her children were adjudicated neglected and removed from her custody. It was unfair for the mother to receive feedback on her progress seven months after she was entitled to it.

5. Child Abuse and Neglect— adjudicatory hearings—delays—prejudice

The fathers of children alleged to be neglected and dependent suffered prejudice as a result of the trial court's failure to conduct an adjudicatory hearing within the time frame prescribed by N.C.G.S. § 7B-801(c). Following the statutory timeliness would have allowed time to seek and comply with reunification orders from the trial court.

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Appeal by Respondents from orders entered 28 April 2006 and 19 September 2006 by Judge Daniel F. Finch in District Court, Vance County. Heard in the Court of Appeals 22 August 2007.

Duncan B. McCormick for Respondent-Mother; Peter Wood for Respondent-Father R.L.; and Robin E. Strickland for Respondent-Father D.D.

Law Offices of Carolyn J. Yancey, P.A., by Carolyn J. Yancey, for Petitioner-Appellee Vance County Department of Social Services.

McGEE, Judge.

R.L. and N.M.Y. are the minor children of Respondent-Mother. Respondent-Father R.L. is the father of the minor child R.L. and Respondent-Father D.D. is the father of the minor child N.M.Y. The Vance County Department of Social Services (DSS) filed juvenile petitions on 23 August 2004 alleging that R.L. and N.M.Y., both three years old at the time, were neglected and dependent. The trial court adjudicated both R.L. and N.M.Y. to be neglected as to Respondent-Mother on 9 March 2005. The trial court conducted a dispositional hearing on 4 May 2005 and placed R.L. and N.M.Y. in the legal and physical custody of DSS. In order to regain custody of her children, the trial court ordered Respondent-Mother to meet a number of goals, including, *inter alia*, maintaining adequate housing and food, completing mental health and anger management evaluations, submitting to random drug screenings, and attending parenting classes. The trial court was to review Respondent-Mother's progress three months later, on 3 August 2005.

Respondent-Father R.L. was served with the juvenile petition on 23 March 2005. The trial court originally scheduled R.L.'s adjudication hearing for 4 May 2005, but continued the hearing twice because of a crowded docket and once because Respondent-Father R.L. was unable to attend. Respondent-Father D.D. was served with the juvenile petition on 3 August 2005 after a paternity test determined that he was N.M.Y.'s father. The trial court then continued the entire case, including Respondent-Mother's review hearing, eleven times between 3 August 2005 and 22 February 2006. Of the eleven continuances, five were due to a crowded docket, and six were due to the absence of one or more parties and/or their attorneys.

The trial court finally held R.L.'s and N.M.Y.'s adjudication hearings on 22 February 2006, and adjudicated both R.L. and N.M.Y.

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dependent as to their respective fathers. The trial court then held a disposition and permanency planning hearing on 6 March 2006. The trial court found all Respondents' progress towards reunification with R.L. and N.M.Y. to be unsatisfactory. The trial court changed the minors' permanent plans from reunification to adoption and directed DSS to initiate termination of parental rights proceedings as to all three Respondents. The trial court reduced to writing, signed, and entered the adjudication and disposition orders seven weeks later on 28 April 2006, except for R.L.'s adjudication order. The trial court did not enter that order until 19 September 2006, nearly seven months after the adjudicatory hearing. This delay occurred despite efforts by counsel to have the trial court issue the order in a timely fashion. As a result, Respondents twice sought, and were granted, extensions of time to prepare the proposed record on appeal.

Respondent-Mother, Respondent-Father R.L., and Respondent-Father D.D. each appeal the final orders of the trial court. We reverse as to all Respondents.

I.

Two of the stated purposes of our State's juvenile code are "provid[ing] procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents" and "preventing the unnecessary or inappropriate separation of juveniles from their parents." N.C. Gen. Stat. § 7B-100(1), (4) (2005). One way in which the General Assembly has sought to achieve these objectives is by using statutory deadlines to ensure that the time between petition, adjudication, and disposition is kept brief. This ensures that all the parties involved—including the child, the biological parents, and the foster or adoptive parents—are guaranteed timely resolution of sensitive and critical family status questions.

Under N.C. Gen. Stat. § 7B-801(c) (2005), after DSS files a petition in an abuse, neglect, or dependency action, the trial court must hold an adjudicatory hearing within sixty days. The trial court may only avoid this time limit if it determines that a continuance of the case is proper under N.C. Gen. Stat. § 7B-803 (2005). After holding the adjudicatory hearing, the trial court must sign and enter its written adjudication order within thirty days. N.C. Gen. Stat. § 7B-807(b) (2005). If the trial court does not meet this deadline, it must conduct a hearing at the next session of juvenile court "to determine and explain the reason for the delay and to obtain any needed clarification as to the

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contents of the order.” *Id.* The trial court then has an additional ten days to enter the adjudication order. *Id.*

If a minor child is adjudicated abused, neglected, or dependent, the trial court will then hold a dispositional hearing. If the best interests of the minor child so require, the trial court has broad discretion to order the child’s parent or parents to follow a treatment plan “directed toward remediating or remedying behaviors or conditions that led to or contributed to the juvenile’s adjudication or to the [trial] court’s decision to remove custody of the juvenile from the parent.” N.C. Gen. Stat. § 7B-904(c) (2005). If the trial court removes the juvenile from the custody of a parent, it must review the custody order within ninety days of the dispositional hearing, and again within six months of the first review hearing. N.C. Gen. Stat. § 7B-906(a) (2005). Within one year of the initial order removing custody, the trial court must hold a permanency planning hearing “to develop a plan to achieve a safe, permanent home for the juvenile within a reasonable period of time.” N.C. Gen. Stat. § 7B-907(a) (2005).

II.

Respondents each allege that the trial court violated multiple statutory time limits throughout the litigation below. We consider these allegations in turn.

A.

[1] With regard to Respondent-Mother, DSS filed the juvenile petitions on 23 August 2004. The trial court held R.L.’s and N.M.Y.’s adjudicatory hearings on 9 March 2005, and then held their dispositional hearings on 4 May 2005. Pursuant to N.C.G.S. § 7B-906(a), the trial court was required to conduct a review hearing within ninety days after the dispositional hearing, and again within the following six months, to monitor Respondent-Mother’s progress with her reunification plan. The trial court originally scheduled Respondent-Mother’s review hearing for 3 August 2005, within the ninety-day window. However, due to the multiple continuances of the case, the trial court held the first review hearing on 6 March 2006, more than ten months after the dispositional hearing and seven months after the statutory deadline.

With regard to Respondent-Father R.L. and Respondent-Father D.D., DSS filed the juvenile petitions on 23 August 2004. Pursuant to N.C.G.S. § 7B-801(c), the trial court was required to hold R.L.’s and N.M.Y.’s adjudicatory hearings within sixty days unless it continued

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the case in accordance with N.C.G.S. § 7B-803. Respondent-father R.L. was served with the juvenile petition on 23 March 2005, seven months after DSS filed the petition. Due to the multiple continuances of the case, the trial court ultimately held R.L.'s adjudicatory hearing on 22 February 2006, eighteen months after DSS filed the petition and sixteen months after the statutory deadline for the adjudicatory hearing. Even if the sixty-day limit began to run from the date Respondent-Father R.L. was served with the petition, the trial court still held R.L.'s adjudicatory hearing nine months late.

Respondent-Father D.D. was added to the petition and was served on 3 August 2005, nearly one year after DSS filed the petition. Due to the multiple continuances of the case, the trial court ultimately held N.M.Y.'s adjudicatory hearing on 22 February 2006, eighteen months after DSS filed the petition and sixteen months after the statutory deadline for the adjudicatory hearing. Even if the sixty-day limit began to run from the date Respondent-Father D.D. was added to the petition and was served, the trial court still held N.M.Y.'s adjudicatory hearing over four months late.

It is plain that the trial court did not meet the time limits set out in N.C.G.S. § 7B-801(c) and N.C.G.S. § 7B-906(a). The question, then, is whether the multiple continuances of the case were proper, thus excusing the delay. We review a trial court's decision to continue a case on an abuse of discretion standard. *In re J.B.*, 172 N.C. App. 1, 10, 616 S.E.2d 264, 270 (2005). Under N.C.G.S. § 7B-803, a trial court may continue a juvenile hearing if a continuance

is reasonably required to receive additional evidence, reports, or assessments that the court has requested, or other information needed in the best interests of the juvenile and to allow for a reasonable time for the parties to conduct expeditious discovery. Otherwise, continuances shall be granted only in extraordinary circumstances when necessary for the proper administration of justice or in the best interests of the juvenile.

A review of the record indicates that the trial court continued the case fourteen times between 20 April 2005 and 22 February 2006, for the following reasons:

- (1) 20 April 2005, due to lack of time.
- (2) 18 May 2005, due to employment-related absence of Respondent-Father R.L.

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- (3) 6 July 2005, due to lack of time.
- (4) 3 August 2005, due to lack of time.
- (5) 17 August 2005, due to the absence of Respondent-Mother's attorney.
- (6) 7 September 2005, due to the absence of attorneys for Respondent-Mother and Respondent-Father R.L.
- (7) 21 September 2005, due to lack of time.
- (8) 5 October 2005, due to the absence of Respondent-Mother and Respondent-Father R.L.
- (9) 9 November 2005, due to medical-related absence of Respondent-Mother's attorney.
- (10) 23 November 2005, due to the absence of Respondent-Father D.D.'s attorney.
- (11) 7 December 2005, due to lack of time.
- (12) 21 December 2005, due to Respondent-Mother's absence due to a death in her family.
- (13) 18 January 2006, due to lack of time.
- (14) 8 February 2006, due to lack of time.

In total, the trial court continued the case seven times due to a crowded docket, three times due to the absence of Respondents, and four times due to the absence of Respondents' attorneys.

The trial court ordered none of the fourteen continuances for the purpose of "receiv[ing] additional evidence, reports, or assessments that the trial court ha[d] requested, or other information needed in the best interests of the juvenile [or] to allow for a reasonable time for the parties to conduct expeditious discovery." N.C.G.S. § 7B-803. Thus, for each continuance to be proper, the trial court must have encountered "extraordinary circumstances," such that a continuance was "necessary for the proper administration of justice or in the best interests of the juvenile[s]." *Id.*

Under this test, we cannot say that the trial court abused its discretion when it continued the case on 9 November 2005 due to an attorney's medical needs and again on 21 December 2005 due to a death in Respondent-Mother's family. Both of these situations might be considered "extraordinary circumstances" justifying a continu-

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ance. With regard to the five other continuances the trial court ordered due to the absence of either a Respondent or a Respondent's attorney, it is difficult to determine whether extraordinary circumstances might have existed, as the record does not indicate the reasons for these absences. However, we need not decide this issue in light of our analysis of the remaining seven continuances.

The continuance standard in N.C.G.S. § 7B-803 stands in contrast to the general continuance requirement found in the North Carolina Rules of Civil Procedure. Under N.C.R. Civ. P. 40(b), a trial court may grant a continuance "only for good cause shown and upon such terms and conditions as justice may require." While a systemic problem of scheduling too many cases on a given day might constitute "good cause" for continuing a case under Rule 40(b), it is not an "extraordinary circumstance" warranting a continuance in a juvenile case under N.C.G.S. § 7B-803. Given the overall scheme of the juvenile code, which consistently requires speedy resolution of juvenile cases, it is clear that the General Assembly did not contemplate a crowded docket as a circumstance sufficient to warrant delay. Nor does the absence of a respondent, or of a respondent's attorney at a prior hearing, justify a non-emergent continuance of a subsequent hearing. The trial court abused its discretion by continuing this case multiple times in a manner inconsistent with N.C.G.S. § 7B-803. As such, the trial court's violations of the statutory time limits set out in N.C.G.S. § 7B-801(c) and N.C.G.S. § 7B-906(a) were not justified.

B.

[2] Respondent-Father R.L. and Respondent-Father D.D. also allege violations of the statutory time limit found in N.C.G.S. § 7B-807(b), which requires that the adjudicatory order "be reduced to writing, signed, and entered no later than 30 days following the completion of the [adjudicatory] hearing." *Id.* The trial court held R.L.'s and N.M.Y.'s adjudicatory hearings on 22 February 2006, and the trial court rendered adjudications with respect to both R.L. and N.M.Y. at those hearings. The trial court filed the adjudication order as to N.M.Y. on 28 April 2006, more than two months after the adjudicatory hearing and over a month past the statutory deadline. The trial court filed the adjudication order as to R.L. on 19 September 2006, almost seven months after the adjudicatory hearing and six months past the statutory deadline.

The reason for the trial court's delay in entering the adjudication order is not entirely clear from the record. It appears that the trial

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court was waiting for DSS to prepare the order for the trial court. In late July 2006, counsel for Respondent-Father R.L. contacted DSS by telephone and by written letter to inquire as to the status of the order. No response from DSS appears in the record, and the trial court did not enter the order until seven weeks later. The trial court clearly violated the statutory time limit set out in N.C.G.S. § 7B-807(b).

C.

[3] Respondent-Father R.L. also alleges a further violation of N.C.G.S. § 7B-807(b), which states that if the trial court does not enter the adjudicatory order within thirty days of the adjudicatory hearing, it must hold a subsequent hearing to explain and remedy the delay. *Id.* This portion of N.C.G.S. § 7B-807(b) became effective on 1 October 2005 and does not apply to petitions filed before that date. 2005 N.C. Sess. Laws ch. 398, §§ 3, 19. Respondent-Father R.L.'s argument is therefore without merit.

III.

Respondents next allege that they have been prejudiced by the trial court's failure to adhere to the various statutory deadlines applying to these juvenile proceedings. We consider each Respondent's allegations in turn.

A.

[4] Violation of one of the statutory deadlines discussed above is reversible error. However, we have consistently held that violations of "time limitations in the juvenile code . . . do not require reversal of orders in the absence of a showing by the appellant of prejudice resulting from the time delay." *In re C.L.C.*, 171 N.C. App. 438, 443, 615 S.E.2d 704, 707 (2005), *aff'd, disc. review improvidently allowed*, 360 N.C. 475, 628 S.E.2d 760 (2006). Indeed, "the complaining party must appropriately articulate the prejudice arising from the delay in order to justify reversal." *In re S.N.H.*, 177 N.C. App. 82, 86, 627 S.E.2d 510, 513 (2006).

Our recent cases make clear, however, that the length of the delay and the magnitude of deviation from the statutory mandate directly affect the appellant's burden of showing prejudice. *See, e.g., In re C.J.B.*, 171 N.C. App. 132, 135, 614 S.E.2d 368, 370 (2005) ("A review of our recent cases on point exemplifies that the need to show prejudice in order to warrant reversal is highest the fewer number of days the delay exists. And the longer the delay in entry of the order beyond the . . . deadline, the more likely prejudice will be readily apparent.")

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(internal citation omitted); *In re T.W.*, 173 N.C. App. 153, 161, 617 S.E.2d 702, 707 (2005) (“[T]he need to show prejudice diminishes as the delay between [a termination of parental rights hearing] and the date of entry of the order terminating parental rights increases. At more than ten times the permissible time for entry of the order, the need to show prejudice . . . is necessarily diminished exponentially.”). However, egregious delay alone will not give rise to a claim of prejudice *per se*. The appellant must still articulate some specific prejudice that he or she has suffered. *See, e.g., In re S.N.H.*, 177 N.C. App. at 86, 627 S.E.2d at 513 (“a trial court’s violation of statutory time limits in a juvenile case is not reversible error *per se*”); *In re C.J.B.*, 171 N.C. App. at 134, 614 S.E.2d at 369 (“Respondent argues that non-compliance with the thirty-day statute is prejudice *per se*, thus requiring a new hearing. Our Court has never held that entry of the written order outside the thirty-day time limitations . . . was reversible error absent a showing of prejudice.”).

Our precedent in this area is based in large part on cases involving violations of statutory time limits in actions where DSS seeks to terminate parental rights. *See* N.C. Gen. Stat. § 7B-1109(a) (2005) (establishing a ninety-day limit between termination petition and hearing); N.C. Gen. Stat. § 7B-1109(e) (2005) (establishing a thirty-day limit between termination hearing and entry of adjudicatory order). And we recently noted an important distinction between cases involving termination of parental rights and cases involving adjudication of a juvenile as abused, neglected, or dependent. While the former type of case decides the status of parents, the latter type of case decides only the status of juveniles. Thus, in juvenile adjudications “[w]here the parental status is not at issue, it is much more difficult for [parents] to show how the delay prejudiced the parties.” *In re B.M.*, 183 N.C. App. 84, 87, 643 S.E.2d 644, 646 (2007).

With these principles in mind, we turn to Respondents’ allegations of prejudice.

B.

As an initial matter, we note that our prejudice inquiry is limited by the fact that DSS has only filed one appellee brief in this case, in response to Respondent-Father D.D. DSS did not file briefs in response to either Respondent-Mother or Respondent-Father R.L. The reason for DSS’s lack of response is not apparent.

Respondent-Mother alleges that she suffered prejudice due to the trial court’s failure to conduct post-disposition review hearings sub-

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ject to the statutory guidelines in N.C.G.S. § 7B-906(a). At Respondent-Mother's dispositional hearing on 4 May 2005, the trial court ordered Respondent-Mother to complete a number of set goals in order to achieve reunification with R.L. and N.M.Y. Those goals included: (1) maintaining appropriate housing; (2) maintaining adequate food in the home; (3) keeping the home free of drugs and alcohol; (4) completing a mental health evaluation; (5) completing an anger management evaluation; (6) submitting to random drug screenings; (7) attending parenting classes; (8) maintaining contact with DSS and attending all scheduled appointments with DSS; and (9) visiting R.L. and N.M.Y. at a set time. The trial court also apparently ordered Respondent-Mother to keep her own mother (the grandmother of R.L. and N.M.Y.) away from the house due to concerns about the grandmother's alcohol use and promiscuity. However, no written order to this effect appears in the record. It is not clear whether the trial court ordered that the grandmother never be allowed in the house, or that she simply not be allowed in the house when R.L. and N.M.Y. were present.

The trial court held Respondent-Mother's permanency planning hearing, which also served as Respondent-Mother's first review hearing, on 6 March 2006, seven months after the statutory deadline. Respondent-Mother's DSS caseworker testified at that hearing. The caseworker testified that Respondent-Mother had been cooperative and had completed or was making progress on many, if not all, of the written reunification goals. There apparently had been some delay during a period when Respondent-Mother had been ill and had undergone surgery, but Respondent-Mother had made progress since that time. The caseworker's main concern was that Respondent-Mother had not provided any proof of the grandmother's living arrangements.

The trial court concluded that "[Respondent-Mother], while having made some efforts, has failed to make reasonable and timely progress within the twelve months prior to this hearing." Regardless of whether the trial court's finding was supported by the evidence, it was unfair for Respondent-Mother to receive this feedback on her progress seven months after she was entitled to it. Had the trial court complied with the requirements of N.C.G.S. § 7B-906(a), it could have given Respondent-Mother additional directives at least once before the permanency planning hearing. In addition, Respondent-Mother could have explained the circumstances surrounding her illness and could have clarified the trial court's non-written orders regarding the grandmother.

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Although the case had not yet reached the termination-of-parental-rights phase, it had clearly progressed past the point where the only issue was adjudication of the status of R.L. and N.M.Y. The trial court gave Respondent-Mother certain duties and obligations, and her response would directly affect her own legal rights with regard to R.L. and N.M.Y. To demonstrate this, one need only recognize that on the same day as Respondent-Mother's first review hearing, the trial court conducted its final permanency planning hearing, changed the minors' permanent plans from reunification to adoption, and directed DSS to initiate termination proceedings. Respondent-Mother has sufficiently demonstrated that she was prejudiced by the trial court's delay in conducting her review hearing.

[5] Respondent-Father D.D. alleges that he suffered prejudice as a result of the trial court's failure to conduct N.M.Y.'s adjudicatory hearing within the time frame prescribed by N.C.G.S. § 7B-801(c). Unlike Respondent-Mother, who had ten months to comply with her disposition orders before the permanency planning hearing, the trial court held N.M.Y.'s disposition and permanency planning hearings on 6 March 2006, only two weeks after having adjudicated N.M.Y. dependent as to Respondent-Father D.D. Respondent-Father D.D. never received any written orders from the trial court regarding a reunification plan. Yet, the trial court concluded at the disposition and permanency planning hearing that Respondent-Father D.D. "had ample time to show reasonable progress or completion of the previously ordered reunification services," and "failed to make any progress toward changing the conditions which led to the juvenile's removal." Had the trial court held N.M.Y.'s adjudicatory hearing within sixty days of the filing of the petition, or even within sixty days of Respondent-Father D.D. having being added to the petition, Respondent-Father D.D. would have had months before the permanency planning hearing to seek and comply with reunification orders from the trial court.

As with Respondent-Mother, Respondent-Father D.D.'s stake in the case had clearly progressed past the point where the only issue was adjudication of N.M.Y.'s status. Only two weeks after the months-late adjudication hearing, the trial court changed N.M.Y.'s permanent plan from reunification to adoption, and directed DSS to initiate termination proceedings. Further, Respondent-Father D.D.'s legal right to appeal the trial court's final orders was adversely affected by the trial court's seven-month delay in entering the adjudicatory order with regard to R.L., in violation of N.C.G.S. § 7B-807(b). *See, e.g., In*

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re T.L.T., 170 N.C. App. 430, 432, 612 S.E.2d 436, 438 (2005) (finding prejudice and reversing termination order where trial court entered order seven months after termination hearing). Even though Respondent-Father D.D. is not R.L.'s father, his appeal could not move forward until R.L.'s adjudicatory order was entered, such that the proposed record on appeal could be established and agreed upon by the parties. Due to the delay, Respondents sought and were granted two extensions of time to file the proposed record, one by the trial court on 10 August 2006, and one by this Court on 20 September 2006. Given the trial court's egregious violations of the statutory deadlines, Respondent-Father D.D. has sufficiently demonstrated that he was prejudiced by the resulting delays.

Respondent-Father R.L. alleges that he suffered prejudice as a result of the trial court's failure to conduct R.L.'s adjudicatory hearing within the time frame prescribed by N.C.G.S. § 7B-801(c), and also as a result of the trial court's failure to enter the adjudicatory order within the time frame prescribed by N.C.G.S. § 7B-807(b). Respondent-Father R.L. first contends that the delay between the filing of the petition and R.L.'s adjudicatory hearing was so excessive that it was prejudicial per se. As noted above, this Court has previously rejected the notion that violations of statutory time limits in juvenile cases, no matter how egregious, can be prejudicial per se. *See In re S.N.H.*, 177 N.C. App. at 86, 627 S.E.2d at 513; *In re C.J.B.*, 171 N.C. App. at 134, 614 S.E.2d at 369.

However, Respondent-Father R.L. does elaborate somewhat on the specific prejudice he allegedly suffered. He claims "[e]verybody was denied permanence. The appeal was put on hold. The time to file the proposed record on appeal was extended twice due to the delay." These allegations are admittedly less specific than those alleged by Respondent-Mother and Respondent-Father D.D. However, we previously have been willing to closely examine even a vague prejudice claim where a trial court's delay was egregious. In *In re C.J.B.*, for example, the respondent similarly argued that he was prejudiced by the trial court's delay in entering its termination order because "the appellate process was put on hold, [and] any sense of closure . . . was out of reach." *In re C.J.B.*, 171 N.C. App. at 135, 614 S.E.2d at 370. We concluded that "[a]dmittedly, the prejudice argued by [the] respondent in this case is generic and susceptible to challenge, but in light of a five-month delay, little more than common sense is necessary in order to perceive aspects of prejudice to all parties involved." *Id.*

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So too, in this case, the prejudice suffered by Respondent-Father R.L. is clear. As with N.M.Y., the time between the adjudication and permanency planning hearings in R.L.'s case was two weeks. Respondent-Father R.L. was never under reunification orders before or during that time. Yet, the trial court concluded at the disposition and permanency planning hearing that Respondent-Father R.L. "had sufficient time to show reasonable progress or completion of the previously ordered reunification services" but had made no "reasonable and timely progress toward correcting conditions which led to the juveniles' removal." Had the trial court held R.L.'s adjudicatory hearing in a timely fashion, Respondent-Father R.L. would have had close to a year before the permanency planning hearing to seek and comply with reunification orders from the trial court. Further, as with Respondent-Father D.D., Respondent-Father R.L. was adversely affected by the trial court's seven-month delay in entering the adjudication order with respect to R.L. Respondent-Father R.L.'s own right to appeal the trial court's orders was unnecessarily put on hold while he was forced to seek time extensions from both the trial court and this Court. Meanwhile, the delay prolonged R.L.'s placement in temporary foster care, to the detriment of Respondent-Father R.L., his child, and the child's foster parents. See *In re O.S.W.*, 175 N.C. App. 414, 623 S.E.2d 349 (2006). In *In re O.S.W.*, the trial court delayed six months in entering a termination order after the termination hearing. The respondent parent argued on appeal that "he was prejudiced in that his relationship with his son remained severed and he was unable to give notice of his appeal." *Id.* at 415, 623 S.E.2d at 350. The respondent also claimed that "the delay has adversely affected the child and the foster parents in that the child's placement is not permanent and the foster parents have been precluded from adopting the juvenile." *Id.* at 415-16, 623 S.E.2d at 350-51. We held that the trial court's delay "was prejudicial to [the] respondent, the minor child, and the foster parents." *Id.* at 416, 623 S.E.2d at 351.

Given the trial court's egregious violations of the statutory deadlines, Respondent-Father R.L. has sufficiently demonstrated that he was prejudiced by the trial court's numerous statutory violations.

IV.

In light of the foregoing, we do not reach Respondents' remaining assignments of error. We reverse: (a) the trial court's permanency planning order with respect to Respondent-Mother; (b) the trial court's order adjudicating R.L. dependent with respect to

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Respondent-Father R.L.; and (c) the trial court's order adjudicating N.M.Y. dependent with respect to Respondent-Father D.D. We remand for new trials.

We acknowledge that the ultimate result of our holding today is less permanence for Respondents, and for R.L. and N.M.Y. However, as this Court has recognized:

[P]rejudice, if clearly shown by a party, [is not] something to ignore solely because the remedy of reversal further exacerbates the delay. If we were to operate as such, we would either reduce the General Assembly's time lines to a nullity; or worse, escalate violations of them beyond the reason for their existence: the best interests of the child[ren].

In re A.L.G., 173 N.C. App. 551, 554, 619 S.E.2d 561, 564 (2005) (internal citation omitted), *disc. review improvidently allowed*, 360 N.C. 476, 628 S.E.2d 760 (2006).

Reversed and remanded.

Judges STEPHENS and SMITH concur.

STEPHEN AND MICHELLE ARNOLD, ROBERT P. AND ELIZABETH M. BARR, DAVID E. AND KRYSTAL D. BOTTOM, TIMOTHY A. AND JEANETTE P. BRADLEY, CHARLES MICHAEL AND DEBRA S. BRAUN, KENT AND BARBARA CAMPBELL, ROBERT E. AND AIDA V. DUNGAN, RICHARD R. AND CHARLOTTE D. ELEY, JONATHAN A. AND PEGGY J. HILL, STEVEN P. AND CHRISTI W. HURD, JOHN P. AND KIMBERLY J. KENNEDY, PIERCE A. KAHADUWE LIVING TRUST, MARK P. AND JACQUELINE G. RUSCOE, BENJAMIN F. AND SUSAN E. TURNER, JACQUELYN M. WEBB, TRUSTEE OF THE JACQUELYN M. WEBB LIVING TRUST, MARC B. AND JACKIE LEE WESTLE, DERWIN J. AND NANCY L.C. WILLIAMS, ROBERT L. AND BECKY L. WILSON, STEPHEN M. AND JULIA R. EARGLE, AND ROBERT A. AND JANE P. ERRICO, PETITIONERS v. CITY OF ASHEVILLE, RESPONDENT

No. COA06-1167

(Filed 6 November 2007)

1. Cities and Towns— annexation—classification of tracts— subdivision test

A city substantially and strictly complied with the requirements of the annexation statute where petitioners disputed the classification of certain tracts, but the evidence and petitioners'

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own contention supported the classification as non-urban (despite the erroneous classification of one portion as residential); the city correctly excluded non-urban land from its calculations for purposes of N.C.G.S. § 160A-48(c) because it would confound the purpose of the statute to subject land which qualifies under subsection (d) to subsection (c) requirements; the evidence supported the court's finding that the city's mathematical calculations were supported by the evidence; and the city complied with the subdivision test.

2. Cities and Towns— change of ordinance—no notice or hearing required

There was no substantial change to an annexation ordinance necessitating notice or a second hearing where the only change to the ordinance was the deletion of one lot and there was no change in the subsections under which the city sought annexation.

3. Cities and Towns— annexation—extension of police services

A city substantially complied with N.C.G.S. § 160A-47(3)(a) in a disputed annexation in promising to extend services. Although petitioners' contention was based on the officer to resident ratio in North Carolina, the city is required only to provide services on substantially the same basis as elsewhere within the city.

Appeal by petitioners-appellants from judgment entered 31 January 2006 by Judge James W. Morgan in Superior Court, Buncombe County. Heard in the Court of Appeals 28 March 2007.

Dungan & Associates, P.A. by Jeffrey K. Stahl for Petitioners-Appellants.

Robert W. Oast, Jr. for Respondent-Appellee.

STROUD, Judge.

This is an appeal challenging the adoption of an annexation ordinance. Petitioners, landowners in the area to be annexed, instituted this action against respondent, the City of Asheville, to review respondent's adoption of an ordinance that would annex several acres of petitioners' property into the City of Asheville. The questions before this Court are: 1) whether the trial court erred in determining that the City of Asheville substantially complied with N.C. Gen. Stat.

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§ 160A-48; 2) whether the trial court erred in determining that the City of Asheville was not required to hold a second public hearing under N.C. Gen. Stat. § 160A-49(e); and 3) whether the trial court erred in determining that the provisions of the City of Asheville's Services Plan in regard to police protection were sufficient under N.C. Gen. Stat. § 160A-147. In this appeal, we must consider whether the City of Asheville substantially complied with the applicable statutes for annexing land in North Carolina. *Briggs v. City of Asheville*, 159 N.C. App. 558, 560, 583 S.E.2d 733, 735, *disc. rev. denied*, 357 N.C. 657, 589 S.E.2d 886, *disc. rev. denied*, 357 N.C. 657, 589 S.E.2d 887 (2003). For the following reasons, we hold that the City of Asheville substantially complied with the applicable statutes for annexation. Accordingly, we affirm the superior court's order upholding the City of Asheville's annexation ordinance.

I. Background

On 9 April 2002, the City of Asheville ("City") adopted a resolution of intent to consider annexing several acres generally referred to as the Huntington Chase Area ("Area"). On 23 April 2002 the City adopted an Annexation Services Plan ("Services Plan") which included detailed findings on: "Statutory Standards Statements;" "Plan for Extension of Services," including police protection, fire protection, solid waste collection, street maintenance, water distribution, sewer collection, and administrative and other services; "Financing Plan for Annexation Areas;" and "Statement of Impact for Annexation Areas." The Services Plan also had several maps of the Area, including a map specifically addressing each of the following: "present and proposed boundaries," "generalized land use," "existing and proposed water lines," and "present and proposed sanitary sewer lines."

On 3 June 2002 the City held a public informational meeting regarding annexation of the Area. On 11 June 2002 the City held a public hearing concerning the question of annexation of the Area. On 25 June 2002 one lot having the tax parcel identification number (PIN) 9659.11-76-1879 (herein "Lot 1879") was removed from the Area and the City amended the Services Plan to reflect the removal. On 27 June 2002 the City adopted Ordinance No. 2931, "An Ordinance to Extend the Corporate Limits of the City of Asheville, North Carolina, Under the Authority Granted by Part 3, Article 4A, Chapter 160A of the General Statutes [sic] of North Carolina, by Annexing a Contiguous Area Known as the Huntington Chase Area" ("ordinance"). The ordinance was adopted as amended and did not include Lot 1879.

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On 23 August 2002 several landowners in the Area (hereinafter “petitioners”) filed a verified petition for review and appeal of the City’s ordinance. On 31 January 2006, following a non-jury trial in Superior Court, Buncombe County, Judge James W. Morgan affirmed the City’s ordinance. Petitioners appeal.

II. Standard of Review

When a petitioner seeks review of an annexation ordinance, the trial court may receive evidence (1) That the statutory procedure was not followed, or (2) That the provisions of G.S. 160A-47 were not met, or (3) That the provisions of G.S. 160A-48 have not been met. Regarding the questions presented on appeal, we note initially that the trial court concluded that the Report and the record of annexation proceedings demonstrated, *prima facie*, substantial compliance with applicable statutes. Thus, the burden was upon petitioners to show by competent evidence that the [. . .] municipality in fact failed to meet the statutory requirements or that there was irregularity in the proceedings which materially prejudiced their substantive rights.

Chapel Hill Country Club v. Town of Chapel Hill, 97 N.C. App. 171, 175-76, 388 S.E.2d 168, 171, *disc. rev. denied*, 326 N.C. 481, 392 S.E.2d 87 (1990) (internal citation and internal quotations omitted).

Judicial review of an annexation ordinance is limited to determining whether the annexation proceedings substantially comply with the requirements of the applicable annexation statute. Absolute and literal compliance with the annexation statute [. . .] is unnecessary. The party challenging the ordinance has the burden of showing error. On appeal, the findings of fact made below are binding on this Court if supported by the evidence, *even where there may be evidence to the contrary*. However, conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal.

Briggs at 560, 583 S.E.2d at 735 (internal citations and internal quotations omitted) (emphasis added).

III. N.C. Gen. Stat. § 160A-48

[1] Petitioners contend that the City has not complied with N.C. Gen. Stat. § 160A-48(c)(2)-(3). N.C. Gen. Stat. § 160A-48(c)(2)-(3) and (d) provides that:

(c) Part or all of the area to be annexed must be developed for urban purposes at the time of approval of the report provided for

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in G.S. 160A-47. Area of streets and street rights-of-way shall not be used to determine total acreage under this section. An area developed for urban purposes is defined as any area which meets any one of the following standards:

....

(2) Has a total resident population equal to at least one person for each acre of land included within its boundaries, and is subdivided into lots and tracts such that at least sixty percent (60%) of the total acreage consists of lots and tracts three acres or less in size and such that at least sixty-five percent (65%) of the total number of lots and tracts are one acre or less in size; or

(3) Is so developed that at least sixty percent (60%) of the total number of lots and tracts in the area at the time of annexation are used for residential, commercial, industrial, institutional or governmental purposes, and is subdivided into lots and tracts such that at least sixty percent (60%) of the total acreage, not counting the acreage used at the time of annexation for commercial, industrial, governmental or institutional purposes, consists of lots and tracts three acres or less in size. For purposes of this section, a lot or tract shall not be considered in use for a commercial, industrial, institutional, or governmental purpose if the lot or tract is used only temporarily, occasionally, or on an incidental or insubstantial basis in relation to the size and character of the lot or tract. For purposes of this section, acreage in use for commercial, industrial, institutional, or governmental purposes shall include acreage actually occupied by buildings or other man-made structures together with all areas that are reasonably necessary and appurtenant to such facilities for purposes of parking, storage, ingress and egress, utilities, buffering, and other ancillary services and facilities.

....

(d) In addition to areas developed for urban purposes, a governing board may include in the area to be annexed any area which does not meet the requirements of subsection (c).

N.C. Gen. Stat. § 160A-48(c)(2)-(3) and (d) (2001).

Petitioners contend that the trial court erred in affirming the City's ordinance because "the subdivision, classification, and calculations by the City are unfair, inaccurate, and violate the statutory

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intent and requirements.” At trial, the City admitted that it wrongly designated 2.23 acres of a 5.73 acre lot having the PIN 9659.12-88-7529 (“Lot 7529”) as “in use for residential purposes”. After the classification the City then excluded the 5.73 acres from calculations in N.C. Gen. Stat. § 160A-48(c). *See* N.C. Gen. Stat. § 160A-48(c). Petitioners argue that both the classification of Lot 7529’s use and the calculations are incorrect. We disagree.

First, we must address the classification of the 2.23 acres within Lot 7529. The City concedes that the land was originally improperly classified as “residential.” “In classifying lots and tracts as either residential, commercial, industrial, institutional, or governmental, municipalities must look at the *actual use* of the land at the time of annexation.” *Briggs*, 159 N.C. App. at 563, 583 S.E.2d at 737 (emphasis added).

For purposes of [N.C. Gen. Stat. § 160A-48(c)(3)], acreage in use for commercial, industrial, institutional, or governmental purposes shall include acreage actually occupied by buildings or other man-made structures together with all areas that are reasonably necessary and appurtenant to such facilities for purposes of parking, storage, ingress and egress, utilities, buffering, and other ancillary services and facilities . . .

N.C. Gen. Stat. § 160A-48(c)(3). N.C. Gen. Stat. § 160A-53(2) states that “ ‘[u]sed for residential purposes’ shall mean any lot or tract five acres or less in size on which is constructed a habitable dwelling unit.” N.C. Gen. Stat. § 160A-53(2) (2001).

The City concedes that the 2.23 acres within Lot 7529 were improperly classified as “residential” because the entire lot exceeded five acres in size. *See id.* Furthermore, there is no evidence nor do petitioners argue that the land qualifies as “commercial, industrial, institutional or governmental” use. *See* N.C. Gen. Stat. § 160A-47(c)(3). In “Petitioners’ Answers to Respondent’s First Set of Interrogatories” “Petitioners state that all of lot . . . 7529 should be characterized as nonurban.” Thus pursuant to petitioner’s own contention, the City should have properly classified the 2.23 acres as land “[i]n addition to areas developed for urban purposes” under subsection (d) (hereinafter “non-urban”) as it does not meet any of the qualifications to be classified as urban under N.C. Gen. Stat. § 160A-48(c). *See* N.C. Gen. Stat. § 160A-48(c)-(d). Therefore, though we find the City should not have classified the land as “residential” we also find petitioners have failed to show a lack of substantial compliance with

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the requirements of the applicable annexation statute as petitioners themselves would classify the land as “non-urban,” making the subsection (c) calculations inapplicable, pursuant to the reasoning below. *See id*; *Briggs* at 560, 583 S.E.2d at 735.

Next we must address the proper classification of the 3.5 acres within Lot 7529. As previously noted, “actual use” determines how land should be classified. *Briggs*, 159 N.C. App. at 563, 583 S.E.2d at 737. Trial testimony indicated that the 3.5 acres was “undeveloped” and that there may have been an “old chicken house” on the tract. Again, petitioner’s own answers to interrogatories characterize “all of lot . . . 7529 . . . as nonurban.” We therefore find the trial court’s finding of fact that the 3.5 acres should be classified as “non-urban,” to be supported by the evidence.¹

We next consider what land should be included within the N.C. Gen. Stat. § 160A-48(c)(2)-(3) calculations. Petitioners argue land being annexed under subsection (d), though it does not meet the requirements of subsection (c), should be included when calculating “total acreage” for the purposes of subsection (c). *See* N.C. Gen. Stat. § 160A-48(c) and (d). They contend that “total acreage” means both land “developed for urban purposes” under subsection (c) and “non-urban” land under subsection (d). We disagree.

The primary rule of statutory construction is that the intent of the legislature controls the interpretation of a statute. The foremost task in statutory interpretation is to determine legislative intent while giving the language of the statute its natural and ordinary meaning unless the context requires otherwise. Where the statutory language is clear and unambiguous, the Court does not engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language. If the language is ambiguous or unclear, the reviewing court must construe the statute in an attempt not to defeat or impair the object of the statute [. . .] if that can reasonably be done without doing violence to the legislative language.

1. Petitioner also argued that the City “arbitrarily divided Lot 7529 into two separate areas in effort [sic] to meet compliance with N.C. Gen. Stat. § 160A-48.” However, because the City has conceded that it incorrectly classified the front portion of the lot as “residential” and has remedied the classification error in its calculations, we need not address this argument. Assuming *arguendo* that petitioner’s classification of the entirety of Lot 7529 as “non-urban” is correct, the City has still conformed with the applicable annexation statute per the reasoning below. *See* N.C. Gen. Stat. § 160A-48(c) and (d).

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Carolina Power & Light Co. v. City of Asheville, 358 N.C. 512, 518, 597 S.E.2d 717, 722 (2004) (internal citations and internal quotations omitted).

The language of the statute makes the legislative intent in subsection (d) clear: “The purpose of this subsection is to permit municipal governing boards to extend corporate limits to include all nearby areas developed for urban purposes and where necessary to include areas *which at the time of annexation are not yet developed for urban purposes*.” N.C. Gen. Stat. § 160A-48(d) (emphasis added). The clear purpose of subsection (d) is to allow cities to annex land which does not qualify as “urban” under subsection (c) if it will qualify under subsection (d). *See id.* It would confound the very purpose of the statute to subject land which qualifies under subsection (d) to subsection (c) requirements, when the stated purpose of subsection (d) is to include land which does not meet the requirements of subsection (c). *See* N.C. Gen. Stat. § 160A-48(c)-(d).

Furthermore, subsection (d) by its own terms applies to areas “[i]n addition to areas developed for urban purposes.” N.C. Gen. Stat. § 160A-48(d) (emphasis added). Such language demonstrates that land qualifying under subsection (d) is not meant to be subjected to the rigors of subsection (c), but rather may be included in the annexation “[i]n addition to” such land. *See id.* We find that “total acreage” under subsection (c) refers only to those acres that fall within subsection (c), those acres “developed for urban purposes.” *See* N.C. Gen. Stat. § 160A-48(c). The City was correct under the language of the statute in excluding “non-urban” land from its calculations for purposes of subsection (c). *See* N.C. Gen. Stat. § 160A-48(c)-(d).

Lastly, this Court must actually apply N.C. Gen. Stat. § 160A-48(c) to determine if the City is in substantial compliance. *See* N.C. Gen. Stat. § 160A-48(c); *Briggs* at 560, 583 S.E.2d at 735. Petitioners assign error to the trial court’s calculations pursuant to N.C. Gen. Stat. § 160A-48(c)(2) and (3). *See* N.C. Gen. Stat. § 160A-48(c)(2)-(3).

[S]ubsection (c)(3) . . . is known as the “Urban Use/Subdivision Test.” This test, in essence, provides that an area is developed for urban purposes if at least sixty percent of the total number of lots in the area are used for residential, commercial, industrial, institutional, or governmental purposes and is subdivided into lots such that at least sixty percent of the total acreage of the area, not counting that used for commercial, industrial, govern-

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mental, or institutional purposes, consists of lots three acres or less in size.

Carolina Power & Light Co. at 513, 597 S.E.2d at 719.

We are bound by the trial court's findings of fact "if supported by the evidence." *See Briggs*, 159 N.C. App. at 560, 583 S.E.2d at 735. Petitioner assigns error to the trial court's decision to incorporate the City's mathematical calculations into its findings of fact because according to petitioners, they are incorrect. However, petitioner has failed to present any alternative calculations as to N.C. Gen. Stat. § 160A-48(c)(3) which would be supported by the evidence, beyond conclusory trial testimony and one exhibit with acreage and classification calculations, but no explanation of how petitioner made its calculations under N.C. Gen. Stat. § 160A-48. We overrule petitioner's assignment of error because the trial testimony and exhibits presented by the City's witnesses contain detailed information regarding the land to be annexed and its use, as well as its mathematical formulas and land classifications, upon which the trial court could properly base its finding that the mathematical calculations were supported by the evidence. *See Briggs*, 159 N.C. App. at 560, 583 S.E.2d at 735.

Since the trial court's findings of fact as to the mathematical calculations of N.C. Gen. Stat. § 160A-48(c)(3) are supported by the evidence, we now apply the use/subdivision test. *See id.*, *Carolina Power & Light Co.* at 513, 597 S.E.2d at 719. Assuming *arguendo*, as urged by petitioners, that the entire Lot 7529 should be classified as "non-urban", the trial court determined that 84.2% of the land was used for urban purposes. The statute requires that "60% of the total number of lots and tracts in the area at the time of annexation are used for residential, commercial, industrial, institutional or governmental purposes" and thus the City has complied with the use test by having 84.2% so used. *See* N.C. Gen. Stat. § 160A-48(c)(3). The trial court also determined that 67.59% of the land "not counting the acreage used at the time of annexation for commercial, industrial, governmental or institutional purposes, consist[ed] of lots and tracts three acres or less in size." *See id.* The statute only requires 60% "not counting the acreage used at the time of annexation for commercial, industrial, governmental or institutional purposes, [to] consist[] of lots and tracts three acres or less in size." *See id.* Thus the City has also complied with the subdivision test. The trial court's mathematical calculations support its conclusions of law because the numbers show *prima facie* compliance with the statutory language of N.C. Gen. Stat. § 160A-48(c)(3). *See id.*

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Subsection (c) uses the conjunction “or” between each subsection, and thus it is clear that the requirements of only one subsection, not all, must be met to satisfy the requirements of subsection (c). *See id.* Thus by meeting the requirements of subsection (c)(3) the City has met the requirements of subsection (c) and this Court has no need to address subsection (c)(2). *See id.* The City has met the requirements of subsection (c)(3) and thus has substantially and strictly complied with the requirements of the annexation statute.² *See Briggs*, 159 N.C. App. at 560, 583 S.E.2d at 735.

IV. Second Public Hearing

[2] Petitioners next argue that upon amending the ordinance to exclude Lot 1879 the City was required to hold a second public hearing. N.C. Gen. Stat. § 160A-49(e) states that an additional public hearing is required for an amended annexation report “if the annexation report is amended to show additional subsections of G.S. 160A-48(c) or (d) under which the annexation qualifies that were not listed in the original report.” N.C. Gen. Stat. § 160A-49(e) (2001).

In *Chapel Hill Country Club*, after the initial public hearing the town of Chapel Hill amended a plat by dividing one lot into thirty, deleting approximately twenty-eight acres, and separately qualifying a strip of land. *Chapel Hill Country Club* at 187, 388 S.E.2d at 177-78. This Court found that

[t]hese changes did not bring any new land within the scope of the annexation ordinance. Nor did the changes involve additional subsections of G.S. 160A-48(c) or (d), under which the annexation qualifies, that were not listed in the original report

[T]he relevant inquiry is whether the amendment effected a substantial change to the ordinance, necessitating notice to those affected thereby. We hold that, in the case below, the Town’s

2. Petitioners also argue that the trial court erred in affirming the City’s ordinance because the City did not comply with N.C. Gen. Stat. § 160A-47(2). Petitioners contend the City failed to provide “[a] statement showing that the area to be annexed meets the requirements of G.S. 160A-48” regarding the subsection (c) calculations. N.C. Gen. Stat. 160A-47(2) (2001). Were this contention true, that the City did not comply with N.C. Gen. Stat. § 160A-48, the City’s “statement showing that the area to be annexed meets the requirements of G.S. 160A-48” would also logically fail. *See* N.C. Gen. Stat. § 160A-47(2). However, for the reasons set forth above, we conclude that the City did substantially comply with N.C. Gen. Stat. § 160A-48, that the City’s statement as to such compliance with N.C. Gen. Stat. § 160A-48 was adequate. *See Briggs* at 560, 583 S.E.2d at 735.

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amendment made no substantial change in the annexation ordinance and that petitioners were not prejudiced by the absence of a second public hearing.

Id., 97 N.C. App. at 187-88, 388 S.E.2d at 178 (internal citations and internal quotations omitted). In *Chapel Hill Country Club*, changes involving much larger areas of land were made to the ordinance, but the court still did not find a “substantial change” in the ordinance which would require notice because no land was added and there were no changes which implicated additional subsections of N.C. Gen. Stat. § 160A-48(c) or (d). *See Chapel Hill Country Club* at 187, 388 S.E.2d at 177-78. Here, with the only change to the ordinance being the deletion of one lot and no change in the subsections of N.C. Gen. Stat. § 160A-48 under which the City sought annexation, we conclude there was no “substantial change to the ordinance, necessitating notice.” *See id.* at 187-88, 388 S.E.2d at 178.

Petitioners also argue that a second public hearing is required because the original ordinance did not comply with statutory requirements, but the amended ordinance does. However, *Sonopress, Inc.*, states, “There is no requirement that a second public hearing be held on an amended annexation proposal, when that amendment is adopted to achieve compliance with G.S. 160A-35.”³ *Sonopress, Inc. v. Town of Weaverville*, 149 N.C. App. 492, 503, 562 S.E.2d 32, 38, *disc. rev. denied*, 355 N.C. 751, 565 S.E.2d 671 (2002) (citation and quotations omitted).

In the present case no additions were made to the Area to be annexed but one lot was removed. There is no requirement that a second public hearing be granted for amendments to an annexation report of this nature. *See* N.C. Gen. Stat. § 160A-49(e); *Chapel Hill Country Club, Inc.*, at 187-88, 388 S.E.2d at 178. We also concluded *supra* that no “substantial change to the ordinance, necessitating notice to those affected thereby” was made. *See id.* at 188, 388 S.E.2d at 178. Therefore, we find that the trial court did not err in concluding that the City was not required to hold a second public hearing.

V. Extension of Police Services to the Area

[3] Lastly, petitioners argue the trial court erred in affirming the ordinance because the City’s Services Report does not make adequate

3. N.C. Gen. Stat. § 160A-35 is the corollary to N.C. Gen. Stat. § 160A-47. *See* N.C. Gen. Stat. § 160A-35 (2001); N.C. Gen. Stat. § 160A-47. The only significant difference in these statutes is that N.C. Gen. Stat. § 160A-35 applies to cities less than 5,000 and N.C. Gen. Stat. § 160A-47 applies to cities of 5,000 or more. *See id.*

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provision for the extension of police services to the annexed Area. N.C. Gen. Stat. § 160A-47 states,

A municipality exercising authority under this Part shall make plans for the extension of services to the area proposed to be annexed and shall, prior to the public hearing provided for in G.S. 160A-49, prepare a report setting forth such plans to provide services to such area. The report shall include:

....

(3) A statement setting forth the plans of the municipality for extending to the area to be annexed each major municipal service performed within the municipality at the time of annexation. Specifically, such plans shall:

- a. Provide for extending police protection, fire protection, solid waste collection and street maintenance services to the area to be annexed on the date of annexation on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation.

N.C. Gen. Stat. § 160A-47(3)(a).

In *Nolan v. Town of Weddington*, this Court stated that

A town is required to extend its municipal services on a non-discriminatory basis, meaning it must provide an annexed area with *substantially the same services it provides to existing town residents*.

....

The sufficiency of services provided to an annexed area, therefore, is measured against what services are provided to existing town residents. A town must provide the annexed area with each major municipal service performed within the municipality, and it must provide those services on *substantially the same basis that they are provided elsewhere within the town*. If a town extends the services it currently provides, and if it extends them in a nondiscriminatory manner, it satisfies the statutory requirements.

Nolan v. Town of Weddington, 182 N.C. App. 486, 490, 642 S.E.2d 261, 264 (2007) (internal citations and internal quotations omitted) (emphasis added).

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The City is required to provide in its Services Plan

(1) information with respect to the current level of services within the Town, (2) a commitment to provide substantially the same level of services in the annexation area, and (3) information as to how the extension of services will be financed; this information is sufficient to allow the public and the courts to determine that the Town has committed itself to provide a nondiscriminatory level of services to the annexed area and to establish compliance with G.S. [160A-47].

Huyck Corp. v. Town of Wake Forest, 86 N.C. App. 13, 23, 356 S.E.2d 599, 605 (1987), *aff'd*, *per curiam*, 321 N.C. 589, 364 S.E.2d 139 (1988).

Petitioners' argument as to police services is primarily based on the contention that "[i]n North Carolina a ratio of one officer per 300 or 400 residents is typical for cities and towns. The current ratio in Asheville is one officer per 410 residents." The record also reveals a concern that the officer-to-resident ratio was up at the time of the hearing due to some vacancies in the police department. However, petitioners cite no law requiring a city to maintain a ratio of 300-400 residents per officer but only cite evidence that this ratio is an average throughout North Carolina. The City is required only to provide "services on substantially the same basis that they are provided *elsewhere within the town*," not a particular level of service based upon a statewide average. *Nolan* at 490, 642 S.E.2d at 264. The City's Services Report states that "[t]he police/citizen ratio following annexation is estimated at one officer to 417 residents." The Services Report also stated that "[b]ecause of the relatively small size of the annexation areas and close proximity to the existing municipal boundaries, no additional capital or operating expense is anticipated in adding these areas to the existing patrol districts."

We find this evidence to be sufficient to conclude that the City addressed the extension of police services and will be providing such services to the Area "on substantially the same basis that they are provided elsewhere within the town," *see Nolan* at 490, 642 S.E.2d at 264, because of the "small size" and "close proximity" of the area being annexed. In addition, there was no evidence to indicate that any vacancies in the police department's staff were anything beyond a temporary condition. Certainly the actual number of officers employed by a law enforcement agency may vary on a daily basis, considering officers who retire, become disabled, or leave their

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employment for other reasons. The relevant consideration is the City's commitment to provide a particular level of service. The City identified the level of police services "now available to city residents and committed to provide the same services to the annexed area. The statute and case law require no more." *Parkwood Ass'n, Inc. v. City of Durham*, 124 N.C. App. 603, 607, 478 S.E.2d 204, 206 (1996), *disc. rev. denied*, 345 N.C. 345, 483 S.E.2d 175 (1997). Even if the petitioners have concern "over whether they will receive city services in return for city taxes, the City fulfilled its statutory obligation by promising to provide those services [and] [i]f the City fails to provide the services as promised within the statutory time limits, petitioners may apply for a writ of mandamus to order the City to provide those services." *Id.* at 608, 478 S.E.2d at 207.

We conclude that the City substantially complied with N.C. Gen. Stat. § 160A-47(3)(a). *See Briggs* at 560, 583 S.E.2d at 735. Accordingly, this assignment of error is without merit.

VI. Conclusion

For the reasons stated above, we hold that the trial court did not err in upholding the City's 27 June 2002 adoption of the ordinance to annex the area generally referred to as the Huntington Chase Area because 1) the City substantially complied with N.C. Gen. Stat. § 160A-48; 2) the City was not required to hold a second public hearing under N.C. Gen. Stat. § 160A-49(e); and 3) the City's Services Plan adequately addressed the provision of police services to the Area under N.C. Gen. Stat. § 160A-147. *See* N.C. Gen. Stat. §§ 160A-47, 160A-48, and 160A-49(e). Accordingly, we affirm the judgment entered on 31 January 2006 by Judge James W. Morgan in Superior Court, Buncombe County.

AFFIRMED.

Judges McCULLOUGH and ELMORE concur.

IN RE D.B., C.B.

[186 N.C. App. 556 (2007)]

IN RE: D.B., C.B.

No. COA06-1426-2

(Filed 6 November 2007)

1. Jurisdiction— appeal—subject matter jurisdiction only

In an appeal involving the summons and jurisdiction in a termination of parental rights hearing, it was clear that the trial judge had personal jurisdiction and that only subject matter jurisdiction was at issue where the parents appeared at a hearing without raising an objection to sufficiency of process.

2. Jurisdiction— original summons not served—newly issued summons—newly commenced action

The trial court had jurisdiction in a termination of parental rights proceeding where the original summonses were not served, because the service of newly issued summonses commenced new actions and reinvoked the trial court's subject matter jurisdiction.

3. Termination of Parental Rights— failure to hold timely hearing—no prejudice

There was no prejudice in a termination of parental rights proceeding from the failure to hold a timely hearing. The contentions of respondents amount to nothing more than boilerplate assertions used by numerous respondents attempting to show prejudice, including inability to appeal and a lack of permanency. The record is devoid of any evidence showing that but for the delay the result of the hearing would have been different.

4. Termination of Parental Rights— sufficiency of evidence— failure to alleviate conditions

There was sufficient evidence to terminate a mother's parental rights where the parents had engaged in a physical fight in a hospital hallway, with the mother holding the youngest child in her arms during the fight; as a result a care plan was implemented but not completed; the court found that the mother had failed to alleviate the conditions which led to the removal of the children; and the mother told a social worker that the father had tried to attack her and that she had tried to run him over with her car.

Judge TYSON dissenting.

IN RE D.B., C.B.

[186 N.C. App. 556 (2007)]

Appeal by respondents from order entered 9 January 2006 by Judge Edward A. Pone in Cumberland County District Court. Originally heard in the Court of Appeals 4 June 2007. An opinion vacating the order of the trial court was filed by this Court on 7 August 2007. Petition for Rehearing by Cumberland County Department of Social Services was filed on 1 September 2007, granted on 20 September 2007, and heard without additional briefs or oral argument. This opinion supersedes the previous opinion filed on 7 August 2007.

Janet K. Ledbetter for respondent-father appellant.

Katharine Chester for respondent-mother appellant.

Staff Attorney Elizabeth Kennedy-Gurnee for Cumberland County Department of Social Services appellee.

Attorney Advocate Beth A. Hall for Guardian ad Litem.

McCULLOUGH, Judge.

Respondents appeal the trial court's order terminating their parental rights.

On 30 September 2004, a petition to terminate respondents' parental rights as to C.B. and D.B. was filed in Cumberland County District Court. The respondents stipulated that the minor children were neglected at the time of the filing of the verified petition based on domestic violence problems between respondents and that C.B. and D.B. were adjudicated neglected on 31 March 2003. The petition further stated that respondents failed to alleviate the conditions which led to removal, failed to comply with the Family Services Case Plan, and that respondents' rights as to the juveniles should be terminated.

A hearing was held on the petition to terminate respondents' parental rights on 14 December 2005, and the court thereafter entered an order terminating the parental rights of respondents on 9 January 2006. From entry of this order, respondents appeal.

[1] Respondent-mother and respondent-father contend on appeal that the lower court's order must be vacated due to lack of subject matter jurisdiction by the lower court. Specifically, respondents contend the lower court was deprived of subject matter jurisdiction because respondents were not served with valid summonses and the action was discontinued.

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In the instant case, a summons was issued on 7 October 2004 as to respondent-mother and respondent-father, but it was never served upon either party. A second summons was thereafter issued on 18 October 2004 and was served on respondent-mother the same day. Respondent-mother contends that because the original summons was never served and the second summons was not issued by endorsement or as an alias and pluries summons, the action was discontinued due to failure to serve a valid summons. Therefore, the trial court lacked subject matter jurisdiction. After that time, two new summons were issued as to respondent-father on 26 January 2005 and 31 January 2005, respectively. Respondent-father was served with the first summons on 30 January 2005 and the second on 31 January 2005. Respondent-father also argues that the action was discontinued due to failure to serve a valid summons, and therefore, the trial court lacked subject matter jurisdiction.

North Carolina General Statutes section 7B-1101 confers on the District Court the exclusive power to hear actions to terminate parental rights. N.C. Gen. Stat. § 7B-1101 (2005). This subject matter jurisdiction is invoked upon the filing of a verified petition. *In re Triscari Children*, 109 N.C. App. 285, 426 S.E.2d 435 (1993). Subject matter jurisdiction is to be distinguished from personal jurisdiction, the court's power to bind a particular party by its judgment, which, unlike subject matter jurisdiction, can be obtained by a party's "appearance and participation in the legal proceeding without raising an objection to lack of service." *In re S.J.M.*, 184 N.C. App. 42, 645 S.E.2d 798, 802 (2007). Because respondent-mother and respondent-father appeared at the hearing held on 14 December 2005 and 15 December 2005, without raising an objection to the sufficiency of process, it is clear that the trial court had personal jurisdiction over both parties, and only subject matter jurisdiction is at issue.

[2] While a court's subject matter jurisdiction is invoked upon the filing of a verified petition, failure to serve a valid summons in accordance with North Carolina Civil Procedure Rule 4 can divest the court of such jurisdiction. Service of process under Rule 4 is intended to provide notice of the commencement of an action and "to provide a ritual that marks the court's assertion of jurisdiction over the lawsuit." *Harris v. Maready*, 311 N.C. 536, 541-42, 319 S.E.2d 912, 916 (1984) (citation omitted).

Rule 4 provides that a summons is to be issued within 5 days of filing the complaint and is to be served upon a party within 60 days of its issuance. N.C. Gen. Stat. § 1A-1, Rule 4(a),(c) (2005). If a summons

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is not served upon a party within the time allowed, “it becomes ‘dormant’ and cannot effect service except that it be revived or ‘continued’ by either ‘an endorsement upon the original summons . . . or . . . an alias or pluries summons’” *Shiloh Methodist Church v. Keever Heating & Cooling*, 127 N.C. App. 619, 621, 492 S.E.2d 380, 382 (1997) (quoting N.C. Gen. Stat. § 1A-1, Rule 4(d)). If the dormant summons is not continued pursuant to Rule 4(d) within 90 days of its issuance, the original action is deemed to be discontinued as to the defendant upon which service has not been made. N.C. Gen. Stat. § 1A-1, Rule 4(e). The discontinued action is treated as if it were never filed; thus, the court’s subject matter jurisdiction is no longer invoked with respect to that defendant. *In re A.B.D.*, 173 N.C. App. 77, 85, 617 S.E.2d 707, 713 (2005).

However, the law is clear that, even where an original suit is discontinued for failure to serve a summons, the issuance of a new summons begins a new action and reinvokes subject matter jurisdiction. *Stokes v. Wilson and Redding Law Firm*, 72 N.C. App. 107, 111, 323 S.E.2d 470, 474 (1984) (noting that “a properly issued and served second summons can revive and commence a new action on the date of its issuance”), *disc. review denied*, 313 N.C. 612, 332 S.E.2d 83 (1985); *see also Chateau Merisier, Inc. v. GEKA, S.A.*, 142 N.C. App. 684, 686, 544 S.E.2d 815, 817 (2001) (holding that where an original summons was not served within the allocated time and no endorsement nor alias and pluries summons was sought within 90 days, plaintiff’s action was deemed to have begun on the date at which a new summons was issued). Likewise, even where a summons is not yet dormant, the issuance of a new summons without reference to the original summons discontinues the original action and initiates a new one. *Integon Gen. Ins. Co. v. Martin*, 127 N.C. App. 440, 490 S.E.2d 242 (1997); *Mintz v. Frink*, 217 N.C. 101, 6 S.E.2d 804 (1940).

Respondents contend that the action was discontinued because the original summons, which was issued within 5 days of the filing of the petition, was not served upon the parties, and there was no extension given by way of endorsement or alias and pluries summons pursuant to Rule 4(d). While it is true that the original summons was not served within 60 days nor was an extension of time granted, a new valid summons was issued as to both respondents and likewise served upon them. A second summons was issued and served upon respondent-mother on 18 October 2004, within 60 days of the issuance of the original summons. While the original summons was not yet dormant, because the second summons did not conform with the

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requirements of Rule 4(d), the original action was discontinued, and the trial court's subject matter jurisdiction was reinvoiced as of 18 October 2004.

Respondent-father was issued and served with two valid summons, issued on 26 January 2005 and 31 January 2005, respectively. Though each was issued more than 90 days after the issuance of the original summons, at which time the action was discontinued with respect to respondent-father under Rule 4(e), each new issuance is deemed to revive the action as of the respective date of issuance. The 31 January 2005 summons discontinued the action revived by the 26 January 2005 issuance and commenced a new action against respondent-father as of 31 January 2005. Because both respondents were properly served with newly issued summons, commencing new actions and reinvoicing the trial court's subject matter jurisdiction as of their respective dates of issuance, the contention that the court lacked subject matter jurisdiction over the parties due to ineffective service is without merit.

[3] Respondents further contend the trial court erred in failing to hold a timely hearing on the petition to terminate respondents' parental rights in violation of N.C. Gen. Stat. § 7B-1109(a) (2005).

The North Carolina General Statutes set forth that a hearing on the termination of parental rights shall be held no later than 90 days from the filing of the petition to terminate such rights. N.C. Gen. Stat. § 7B-1109(a). This Court has held that the failure of the trial court to enter a termination order within the time standards in N.C. Gen. Stat. § 7B-1109(e) constitutes reversible error where the appellant demonstrates prejudice as a result of the delay. *See In re P.L.P.*, 173 N.C. App. 1, 7, 618 S.E.2d 241, 245 (2005), *aff'd*, 360 N.C. 360, 625 S.E.2d 779 (2006). This Court has extended the reasoning regarding failure to enter a timely order to the failure to hold the termination hearing within the time period set forth in N.C. Gen. Stat. § 7B-1109(a). *In re S.W.*, 175 N.C. App. 719, 722, 625 S.E.2d 594, 596, *disc. review denied*, 360 N.C. 534, 635 S.E.2d 59 (2006).

Where there does not appear to be a clear articulation by this Court as to the standard by which prejudice should be measured, we adopt the reasoning set forth in Judge Levinson's concurrence in *In re J.N.S.*, 180 N.C. App. 573, 578-82, 637 S.E.2d 914, 917-19 (2006), by which this Court must determine "whether the error in question had a probable impact on the outcome of the proceeding." *Id.* at 578, 637 S.E.2d at 917. Such standard for determining prejudice has been ar-

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ticated by this Court in criminal and civil cases alike, and we have opined that “judgment should not be reversed because of a technical error which did not affect the outcome at trial. The test for granting a new trial is whether there is a reasonable probability that at the new trial the result would be different.” *Lewis v. Carolina Squire, Inc.*, 91 N.C. App. 588, 595-96, 372 S.E.2d 882, 887 (1988) (citation omitted).

The contentions by respondents on appeal amount to nothing more than boilerplate assertions used by numerous respondents attempting to show prejudice from temporal delay regarding termination of parental rights including an inability to file an appeal and the lack of permanency for the parties involved. Such assertions are insufficient to warrant a showing of prejudice. Further, the record is devoid of any evidence showing that but for the delay in holding the hearing, the result of the hearing on the petition to terminate parental rights would have been different. Therefore, the corresponding assignments of error are overruled.

[4] Respondent-mother further contends that the trial court erred in terminating her parental rights where there was insufficient evidence to support the findings of fact and the findings fail to support the conclusions of law.

Termination of parental rights involves a two-stage process. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). At the adjudicatory stage, “the petitioner has the burden of establishing by clear and convincing evidence that at least one of the statutory grounds listed in N.C. Gen. Stat. § 7B-1111 exists.” *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002). “If the trial court determines that grounds for termination exist, it proceeds to the dispositional stage, and must consider whether terminating parental rights is in the best interests of the child.” *Id.* at 98, 564 S.E.2d at 602.

The trial court’s decision to terminate parental rights is reviewed under an abuse of discretion standard. *Id.* “The standard for appellate review is whether the trial court’s findings of fact are supported by clear, cogent, and convincing evidence and whether those findings of fact support its conclusions of law.” *In re C.C., J.C.*, 173 N.C. App. 375, 380, 618 S.E.2d 813, 817 (2005). Where a trial court concludes that parental rights should be terminated pursuant to several of the statutory grounds, the order of termination will be affirmed if the court’s conclusion with respect to any one of the statutory grounds is supported by valid findings of fact. *In re Swisher*, 74 N.C. App. 239, 240-41, 328 S.E.2d 33, 34-35 (1985).

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Parental rights may be terminated under N.C. Gen. Stat. § 7B-1111 where “[t]he parent has abused or neglected the juvenile.” N.C. Gen. Stat. § 7B-1111(a)(1) (2005). A neglected juvenile is defined as

[a] juvenile who does not receive proper care, supervision, or discipline from the juvenile’s parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile’s welfare[.]

N.C. Gen. Stat. § 7B-101(15) (2005).

The evidence before the lower court tended to show that D.B. and C.B. came into the custody of DSS based on a referral from Cape Fear Valley Hospital where respondents engaged in a physical fight at the hospital in the middle of the hallway. The social worker testified that during the physical altercation, not only were the minor children present, but respondent-mother was holding her youngest child in her arms while fighting with respondent-father. Respondent-mother was charged and incarcerated as a result of this incident. The social worker testified that after the children were placed in the custody of DSS, a care plan was put in place to assist respondents in addressing the domestic violence between respondents. The care plan required anger management for respondent-father, RESOLVE domestic violence classes for both respondents, and individual counseling for respondent-mother to work on her self-esteem. This plan was entered into by respondent-mother; however, at the time the petition to terminate parental rights was filed on 4 October 2004, she had failed to complete the RESOLVE program. The trial court found that her failure to complete the RESOLVE program, failure to attend individual counseling, and failure to address her substance abuse issues was a willful failure to alleviate the conditions which led to the removal of her minor children. Further, respondent-mother told the social worker that in January of 2004 respondent-father tried to attack her and she then attempted to run over him with her car. Such evidence clearly supports the court’s finding and conclusion that D.B. and C.B. are neglected children under N.C. Gen. Stat. § 7B-101.

Our holding with respect to this ground for termination makes it unnecessary for us to consider respondent-mother’s arguments concerning the other grounds upon which their parental rights were terminated. *See Swisher*, 74 N.C. App. at 240-41, 328 S.E.2d at 34-35. The corresponding assignments of error are overruled.

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Accordingly, the order of the trial court is affirmed.

Affirmed.

Chief Judge MARTIN concurs.

Judge TYSON dissents in a separate opinion.

TYSON, Judge dissenting.

The majority's opinion holds a second summons, issued and served without a new verified petition or complaint being filed or with a court order issued and attached to allow a delayed filing, revives and reinvokes the court's subject matter jurisdiction to decide allegations contained in a discontinued and void petition. I disagree. The original summons and verified petition was not served on respondents within sixty days and no extension by endorsement or alias and pluries summons was issued by the Clerk of Superior Court. That action was discontinued and the trial court lost jurisdiction over the proceedings based upon the original petition. I vote to vacate the trial court's order terminating respondents' parental rights for lack of subject matter jurisdiction. I respectfully dissent.

I. Standard of Review

"[A] court has inherent power to inquire into, and determine, whether it has jurisdiction and to dismiss an action *ex mero motu* when subject matter jurisdiction is lacking." *Reece v. Forga*, 138 N.C. App. 703, 704, 531 S.E.2d 881, 882, *disc. rev. denied*, 352 N.C. 676, 545 S.E.2d 428 (2000). "The question of subject matter jurisdiction may properly be raised for the first time on appeal." *Bache Halsey Stuart, Inc. v. Hunsucker*, 38 N.C. App. 414, 421, 248 S.E.2d 567, 571 (1978), *disc. rev. denied*, 296 N.C. 583, 254 S.E.2d 32 (1979).

II. Jurisdiction

Termination of parental rights proceedings are governed by the North Carolina Rules of Civil Procedure. *In re Bullabough*, 89 N.C. App. 171, 179, 365 S.E.2d 642, 646 (1988). The majority's opinion correctly states N.C. Gen. Stat. § 7B-1101 (2005) grants the district court exclusive original jurisdiction over matters regarding the termination of parental rights. In juvenile actions, DSS filing a verified petition invokes the court's subject matter jurisdiction. *In re Triscari Children*, 109 N.C. App. 285, 288, 426 S.E.2d 435, 437 (1993).

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Rule 4 of the North Carolina Rules of Civil Procedure governs process and the service of that process. N.C. Gen. Stat. § 1A-1, Rule 4 (2005). “A defect in service of process is jurisdictional, rendering any judgment or order obtained thereby void.” *In re Shermer*, 156 N.C. App. 281, 291, 576 S.E.2d 403, 410 (2003) (citations and quotations omitted). At a minimum, due process requires notice of the pendency of an action and the opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 94 L. Ed. 865, 873 (1950).

A. Rule 3 and Rule 4

Rule 4 requires a summons to be issued within five days of filing the complaint or verified petition. N.C. Gen. Stat. § 1A-1, Rule 4(a) (2005). If a summons is issued without a complaint or verified petition attached, the party must make an “application to the court stating the nature and purpose of his action and requesting permission to file his complaint within 20 days.” N.C. Gen. Stat. § 1A-1, Rule 3(a)(1) (2005). The court must then “make[] an order stating the nature and purpose of the action and granting the requested permission.” N.C. Gen. Stat. § 1A-1, Rule 3(a)(2) (2005). “The summons *and the court’s order* shall be served in accordance with the provisions of Rule 4.” N.C. Gen. Stat. § 1A-1, Rule 3(a) (2005) (emphasis supplied).

The summons and petition must be served upon the opposing party within sixty days of its issuance. N.C. Gen. Stat. § 1A-1, Rule 4(c) (2005). If the summons is not served on the parties within sixty days, “Rule 4(d) permits the action to be continued, so as to relate back to the date of issue of the original summons, by an endorsement from the clerk or issuance of an alias or pluries summons within ninety days of the issuance of the last preceding summons.” *Lemons v. Old Hickory Council, Boy Scouts, Inc.*, 322 N.C. 271, 275, 367 S.E.2d 655, 657 (1988). DSS neither obtained an endorsement nor sought issuance of an alias or pluries summons in this case.

“Rule 4(e) specifically provides that where there is neither endorsement nor issuance of alias or pluries summons within ninety days after issuance of the last preceding summons, the action is *discontinued* as to any defendant not served within the time allowed and [is] *treated as if it had never been filed*.” *Dozier v. Crandall*, 105 N.C. App. 74, 78, 411 S.E.2d 635, 638 (emphasis supplied) (citing *Johnson v. City of Raleigh*, 98 N.C. App. 147, 148-49, 389 S.E.2d 849, 851, *disc. rev. denied*, 327 N.C. 140, 394 S.E.2d 176 (1990)), *disc. rev. denied*, 332 N.C. 480, 420 S.E.2d 826 (1992). “[W]here an action has not been

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filed, a trial court necessarily lacks subject matter jurisdiction.” *In re A.B.D.*, 173 N.C. App. 77, 86, 617 S.E.2d 707, 713 (2005).

DSS filed a verified petition to terminate respondents’ parental rights on 4 October 2004. Pursuant to Rule 4(a), a summons was issued to respondent-mother and respondent-father on 7 October 2004. The original summons and verified petition were not served on either of respondents and the Sheriff returned the process as unserved. Neither an endorsement of the original summons nor an alias or pluries summons was issued by the Clerk of Superior Court within ninety days after issuance of the original summons. N.C. Gen. Stat. § 1A-1, Rule 4(e) (2005). The original verified petition to terminate the parental rights of both respondents was “discontinued and [is] treated as it was never filed.” *Dozier*, 105 N.C. App. at 78, 411 S.E.2d at 638; see *Snead v. Foxx*, 329 N.C. 669, 673, 406 S.E.2d 829, 832 (1991) (When Rule 4 has not been complied with, it provides for discontinuance of the action.). A second summons was issued and served upon respondent-mother on 18 October 2004 and upon respondent-father on 26 and 31 January 2005.

The majority’s opinion correctly states “even where a summons is not yet dormant, the issuance of a new summons without reference to the original summons discontinues the original action and initiates a new one.” The majority’s opinion purports to hold the issuance of the second summons without DSS filing a new verified petition reinvoked subject matter jurisdiction on 18 October 2004 over respondent-mother and on 31 January over respondent-father. I disagree.

Rule 3 of the North Carolina Rules of Civil Procedure states, “a civil action is commenced by filing a complaint with the court.” N.C. Gen. Stat. § 1A-1, Rule 3. Similarly, in juvenile actions, the filing of a verified petition establishes the district court’s subject matter jurisdiction. *In re Triscari Children*, 109 N.C. App. at 288, 426 S.E.2d at 437. Here, the second summons was served upon respondent-mother and respondent-father without DSS attaching a court order granting a delayed filing of the petition required by Rule 3(a) or filing a new verified petition to terminate respondents’ parental rights as is required by N.C. Gen. Stat. § 7B-1104.

The second summons failed to relate back to the original verified petition because the original petition is deemed “discontinued and treated as it was never filed.” *Dozier*, 105 N.C. App. at 78, 411 S.E.2d at 638. Without a valid verified petition or court order allowing delayed filing, the trial court did not acquire subject matter jurisdic-

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tion to enter its order terminating respondents' parental rights. N.C. Gen. Stat. § 7B-1104; N.C. Gen. Stat. § 1A-1, Rule 3. The trial court's order is "void" and must be vacated. *Shermer*, 156 N.C. App. at 291, 576 S.E.2d at 410.

III. Conclusion

Non-compliance with Rule 3 and Rule 4 divests the trial court of subject matter jurisdiction and renders its order "void." *Id.* at 291, 576 S.E.2d at 410. In the present case, DSS did not comply with either Rule 3 or Rule 4.

The original summons and verified petition was not served upon respondents within sixty days of its issuance pursuant to Rule 4(c). The termination proceedings were "discontinued" and the original verified petition is "treated as it was never filed." *Dozier*, 105 N.C. App. at 78, 411 S.E.2d at 638.

DSS failed to obtain an extension by endorsement or to have an alias and pluries summons issued "to revive [the] discontinued action." *Byrd v. Trustees of Watts Hospital, Inc.*, 29 N.C. App. 564, 569, 225 S.E.2d 329, 332 (1976).

The second summons issued and served upon respondents "commenced a new action on the date of its issuance." *Stokes v. Wilson and Redding Law Firm*, 72 N.C. App. 107, 111, 323 S.E.2d 470, 474 (1984), *disc. rev. denied*, 313 N.C. 612, 332 S.E.2d 83 (1985). No new verified petition or court order granting delayed filing was attached to the second summons as is statutorily required to invoke the jurisdiction of the district court. N.C. Gen. Stat. § 7B-1104; N.C. Gen. Stat. § 1A-1, Rule 3.

The majority's opinion holds serious consequences for all civil actions beyond the facts and circumstances of this case, as it would overlook violations of Rule 3 and Rule 4 of the North Carolina Rules of Civil Procedure and disregards the absence of subject matter jurisdiction. No new verified petition or court order granting a delayed filing was attached to the summons before us. The trial court was without subject matter jurisdiction when it entered its order terminating respondents' parental rights.

In the absence of subject matter jurisdiction, the trial court's order is void and should be vacated. I vote to vacate the trial court's order terminating respondents' parental rights. I respectfully dissent.

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IN THE MATTER: THE APPEAL OF: TYLETA W. MORGAN FROM THE DECISION OF THE
HENDERSON COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE TAXATION OF
CERTAIN REAL PROPERTY FOR TAX YEARS 1995 THROUGH 2003

No. COA06-1423

(Filed 6 November 2007)

1. Taxation— ad valorem taxes—failure to assess—not an immaterial irregularity

A county's failure to include an assessment for petitioner's residence in her tax bills from 1995 through 2003 was not an immaterial irregularity. There was substantial evidence tending to show that the County had multiple opportunities to assess the property, but failed to do so.

2. Taxation— ad valorem taxes—failure to assess—interest

Nothing in N.C.G.S. § 105-394 allows a county to attempt to collect interest and penalties in addition to back taxes allegedly owed when the county grossly and repeatedly failed to assess the listed property.

Judge GEER dissenting.

Appeal by Henderson County from final decision entered 17 July 2006 by Chairman Terry L. Wheeler for the North Carolina Property Tax Commission. Heard in the Court of Appeals 23 May 2007.

DeVore, Acton & Stafford, PA, by Fred W. DeVore, III, for taxpayer-appellee Tyleta W. Morgan.

Parker Poe Adams & Bernstein LLP, by Charles C. Meeker and Benn A. Brewington, III, for appellant Henderson County.

Paul A. Meyer, for amicus curiae North Carolina Association of County Commissioners.

TYSON, Judge.

Henderson County ("the County") appeals from final decision entered prohibiting it from attempting to collect unpaid back taxes and interest on real property owned by Tyleta W. Morgan ("Mrs. Morgan"). We affirm.

I. Background

Mrs. Morgan has owned approximately eighty-five acres of rural land in the County since 1972. In 1991, the property was placed in the

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Forestry Management Program as “forestry” land and as a result was assessed at a relatively low present use tax value.

Mrs. Morgan and her husband, now deceased, began building a house on this property in 1986 that was finished in approximately 1993. Mr. Morgan obtained all required permits from the County to build the home, and the County inspected the construction in 1986.

In 1993, when the residence was eighty percent complete, Mr. Morgan listed the house on his county tax listing form. The County performed countywide reappraisals effective 1 January 1999 and 1 January 2003. An appraiser with the County Tax Assessor’s Office visited the Morgans’ property during those reappraisals. The listed residence remained unassessed.

In 2004, the County Tax Assessor’s Office finally assessed taxes on the Morgans’ residence and asserted that Mrs. Morgan owed back taxes and interest in the amount of \$8,533.61 for tax years 1995 through 2003. Mrs. Morgan paid the sum and appealed to the Henderson County Board of Equalization and Review. The Board upheld the decision of the County Tax Assessor’s Office and Mrs. Morgan appealed to the North Carolina Property Tax Commission (“the Commission”).

The Commission found that Mrs. Morgan did not question the tax valuation of the property, but the County should have “ascertained values for the subject residence prior to the notice . . . to recover back[] taxes associated with the subject residence.” Based upon its findings of fact, the Commission concluded “the failure of the Tax Assessor to include upon Taxpayer’s 1995 through 2003 tax bills valuation assessments for the subject residence was not an immaterial irregularity” and barred the County from attempting to collect the back taxes. The County appeals.

II. Issue

The County argues the Commission erred by concluding that it improperly issued assessment notices for the years 1995 through 2003 because the failure to assess the Morgans’ residence was an immaterial irregularity pursuant to N.C. Gen. Stat. § 105-394.

III. Standard of Review

This Court reviews the Commission’s decision under the whole record test. The whole record test is not a tool of judicial intrusion and this Court only considers whether the Commission’s

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decision has a rational basis in the evidence. We may not substitute our judgment for that of the Commission even when reasonably conflicting views of the evidence exist.

In re Weaver Inv. Co., 165 N.C. App. 198, 201, 598 S.E.2d 591, 593 (internal citations and quotations omitted), *disc. rev. denied*, 359 N.C. 188, 606 S.E.2d 695 (2004).

IV. Immaterial Irregularities

[1] The County argues the failure by the County Tax Assessor's Office to include valuation assessments for Mrs. Morgan's residence on her 1995 through 2003 tax bills was an "immaterial irregularity" pursuant to N.C. Gen. Stat. § 105-394, and it is not barred from collecting nearly a decade's worth of back taxes. We disagree.

N.C. Gen. Stat. § 105-394 (2005) states, in relevant part:

Immaterial irregularities in the listing, appraisal, or assessment of property for taxation or in the levy or collection of the property tax or in any other proceeding or requirement of this Subchapter shall not invalidate the tax imposed upon any property or any process of listing, appraisal, assessment, levy, collection, or any other proceeding under this Subchapter.

The following are examples of immaterial irregularities:

....

(3) The failure to list, appraise, or assess any property for taxation or to levy any tax within the time prescribed by law.

The County and dissenting opinion cite *In re Appeal of Dickey*, 110 N.C. App. 823, 431 S.E.2d 203 (1993), to support the position that the County's failure to assess Mrs. Morgan's house for eleven years falls within the definition of "immaterial irregularities." We disagree.

In *In re Appeal of Dickey*, the tax assessor accidentally removed a portion of the Dickey's property from the 1989 tax listing form. 110 N.C. App. at 825, 431 S.E.2d at 204. This Court reversed the Commission's decision to relieve the Dickey's from their 1989 tax obligation. This Court stated, "a clerical error by a tax supervisor's office is an immaterial irregularity under G.S. 105-394 so as not to invalidate the tax levied on the property." *Id.* at 829, 431 S.E.2d at 207 (citation omitted) (emphasis supplied). We held:

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Based on the clear and unambiguous language of Section 105-394, we conclude that the failure by the Assessor due to an *administrative error* to include on the Dickey's 1989 tax bill an assessment for the improvements to the lot is an immaterial irregularity and does not, contrary to the Dickey's contention, invalidate the tax owed on the house.

Id. (emphasis supplied).

The Commission's final decision did not ignore *In re Appeal of Dickey*, but expressly distinguished that case from the facts here. The Commission found substantial evidence was presented to support its finding that "the Tax Assessor could have obtained valuations for the subject residence prior to issuing the Notices of Immaterial Irregularity for tax years 1995 through 2003." This finding of fact was based upon the Commission's recitation of the evidence Mrs. Morgan presented:

(1) the Taxpayer's husband listed the subject residence with the Henderson County Tax Office, effective January 1, 1993, as eighty percent (80%) complete and instructed the Tax Assessor to contact him if there were questions regarding his listing; (2) The Taxpayer's husband obtained all necessary permits during the construction of the subject residence; (3) After the subject property's original listing in January 1, 1993, the Tax Assessor conducted at least two countywide reappraisals, effective as of January 1, 1999 and January 1, 2003; and (4) An appraiser with the Henderson County Tax Office visited the site of the subject property during the time of the county's reappraisals. Thus, the Tax Assessor had ample information to know that a house was situated on the property.

The Commission concluded "the action of the Tax Assessor, under the facts and circumstances at issue . . . [is not] an immaterial irregularity since his action in the matter does not constitute a clerical or administrative error."

Mrs. Morgan presented, and the Commission found, substantial evidence tending to show the County was provided multiple opportunities to assess the property, but failed to do so. This evidence supports the Commission's conclusion that the action of the County Tax Assessor's Office was neither a "clerical or administrative error." *Id.*

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V. Adding Interest to Past Taxes

[2] Presuming *arguendo*, the dissenting opinion's application of *In re Appeal of Dickey*, correctly categorizes the actions of the County Tax Assessor's Office as an immaterial irregularity and the County may levy taxes upon Mrs. Morgan's residence for years 1995 through 2003, the County is barred from collecting any interest accrued during this time period. N.C. Gen. Stat. § 105-394 provides that immaterial regularities do not "invalidate *taxes* imposed upon any property." (Emphasis supplied). No provision in this statute supports the County's assertion that it is entitled to recover interest in addition to the property taxes, when non-payment was due to the gross and repeated failures to assess by the County Tax Assessor's Office.

In *In re Nuzum-Cross Chevrolet*, the taxpayer's business personal property was taxed at a lower rate than it should have been for three years due to a clerical error. 59 N.C. App. 332, 333, 296 S.E.2d 499, 500 (1982), *disc. rev. denied*, 307 N.C. 576, 299 S.E.2d 645 (1983). The tax assessor issued a notice of attachment and garnishment upon the taxpayer and the garnishee, First National Bank of Catawba County, which included the amount of unpaid taxes, plus penalties and interest fees. *Id.* After a hearing, the trial court issued an order directing the garnishee to remit the total taxes due "*minus any penalty and interest.*" *Id.* (emphasis supplied). This Court affirmed the trial court's order. *Id.*

Nothing in this statute allows the County to attempt to collect interest and penalties in addition to back taxes allegedly owed, when the County grossly and repeatedly failed to assess the listed property. *Id.*

VI. Conclusion

"N.C. Gen. Stat. § 105-394 . . . is intended to cover cases where there is no dispute that but for the *clerical error*, the tax would have been valid." *In re Nuzum-Cross Chevrolet*, 59 N.C. App. at 334, 296 S.E.2d at 500 (emphasis supplied). Under our standard of review, the Commission's findings of fact are based upon substantial evidence in the whole record and those findings support its conclusion that the failure by the County Tax Assessor's Office to assess the value of the Morgans' residence for more than ten years after it was properly listed by Mr. Morgan, was not a minor clerical or administrative error. The Commission could properly conclude N.C. Gen. Stat. § 105-394 is inapplicable to these facts.

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As a reviewing Court, we only consider “whether the Commission’s decision has a rational basis in the evidence.” *Weaver*, 165 N.C. App. at 201, 598 S.E.2d at 593. “We may not substitute our judgment for that of the Commission even when reasonably conflicting views of the evidence exist.” *Id.* The Commission’s final decision holding that the County is barred from recovering property taxes and the interest and penalties thereon for tax years 1995 through 2003 is affirmed.

Affirmed.

Judge ELMORE concurs.

Judge GEER dissents by separate opinion.

GEER, Judge, dissenting.

The majority holds that a failure to list property cannot constitute an “immaterial irregularity” under N.C. Gen. Stat. § 105-394 (2005) unless the failure was due to a clerical or administrative error. I believe that the majority has inserted language into the statute. I would hold that the plain language of the statute without alteration and this Court’s opinion in *In re Appeal of Dickey*, 110 N.C. App. 823, 431 S.E.2d 203 (1993), require reversal of the Property Tax Commission.

I agree with the North Carolina Association of County Commissioners’ assertion in its amicus brief that the Commission was improperly attempting “to assert a public policy that is contrary to the policy adopted by the legislature.” The Commission and the majority opinion have improperly imposed their view of appropriate public policy—fairness to individual taxpayers—to override other public policies promoted by the statute’s plain language such as equality of taxation and reduction of tax rates. I, therefore, respectfully dissent.

This Court may reverse or modify a decision of the Property Tax Commission:

if the substantial rights of the appellants have been prejudiced because the Commission’s findings, inferences, conclusions or decisions are:

- (1) In violation of constitutional provisions; or
- (2) In excess of statutory authority or jurisdiction of the Commission; or

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- (3) Made upon unlawful proceedings; or
- (4) Affected by other errors of law; or
- (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or
- (6) Arbitrary or capricious.

N.C. Gen. Stat. § 105-345.2 (2005). I would hold that the Property Commission's decision was affected by error of law and is not supported by competent evidence.

N.C. Gen. Stat. § 105-394 provides:

Immaterial irregularities in the listing, appraisal, or assessment of property for taxation or in the levy or collection of the property tax or in any other proceeding or requirement of this Subchapter shall not invalidate the tax imposed upon any property or any process of listing, appraisal, assessment, levy, collection, or any other proceeding under this Subchapter.

The statute also lists examples of immaterial irregularities, including: "(3) The failure to list, appraise, or assess any property for taxation or to levy any tax within the time prescribed by law." The County contends that its failure to assess Ms. Morgan's house falls within this definition of an immaterial irregularity.

The Property Tax Commission, however, held that application of § 105-394(3) was "not proper under the facts and circumstances of this appeal." The Commission asserted that *Dickey* was distinguishable because, contrary to *Dickey*, in this case (1) "there is substantial evidence in this record to show that the Tax Assessor could have obtained valuations for the subject residence prior to issuing the Notices of Immaterial Irregularity for tax years 1995 through 2003" because the assessor had "ample information" to know of the house's existence, and (2) "[u]nlike the facts in the matter of *In re Dickey*, there is substantial evidence in this record to show that the Legislature did not intend for the action of the Tax Assessor, under the facts and circumstances at issue, to be an immaterial irregularity since his action in this matter does not constitute a clerical or administrative error." The Commission then concluded that applying § 105-394(3) to allow the County to recover back taxes would "violate[] the public policy of this State because a Tax Assessor should not be permitted to benefit from his own omissions or mistakes."

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It is, however, the responsibility of the General Assembly to determine the public policy of the State. *See Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169, 594 S.E.2d 1, 8 (2004) (holding that the legislative branch is, “without question,” the policymaking agency of the State). It is also well settled that the meaning of any statute, such as § 105-394(3), is controlled by the intent of the legislature and that this intent is determined by first looking at the plain language of the statute. *Elec. Supply Co. of Durham, Inc. v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991).

The plain language of the statute states that an immaterial irregularity includes a “failure to . . . assess any property for taxation . . . within the time prescribed by law.” N.C. Gen. Stat. § 105-394(3). Contrary to the decision of the Property Tax Commission and the majority opinion, this language does not require that this failure be due to “a clerical or administrative error.” Although the Commission asserts that this must have been the intent of the General Assembly, our Supreme Court has stressed that when a statute is unambiguous, “[w]e have no power to add to or subtract from the language of the statute.” *Ferguson v. Riddle*, 233 N.C. 54, 57, 62 S.E.2d 525, 528 (1950). *Dickey* specifically held that N.C. Gen. Stat. § 105-394 had “clear and unambiguous language.” 110 N.C. App. at 829, 431 S.E.2d at 207. We thus should not insert into the statute, as the Commission and the majority do, a further limitation that the failure to assess be the result of a clerical or administrative error separate from the failure to assess.

Although *Dickey* did reference an administrative error, nothing in *Dickey* holds that there must be a specific act that resulted in the failure to assess the property. Certainly, destruction of a house listing, as occurred in *Dickey*, is just as negligent as a failure to assess without an identified cause for the failure. Indeed, the Commission’s decision and the majority opinion beg the question of what constitutes a clerical or administrative error sufficient to invoke N.C. Gen. Stat. § 105-394. This absence of clarity is due to the fact that the General Assembly never imposed such a requirement.

It is undisputed that, in the present case, the County failed to assess the Morgan residence within the time prescribed by law. Under the plain language of N.C. Gen. Stat. § 105-394(3), this failure constitutes an immaterial irregularity and did not, therefore, “invalidate the tax levied on the property.” *In re Nuzum-Cross Chevrolet*, 59 N.C. App. 332, 333-34, 296 S.E.2d 499, 500 (1982), *disc. review denied*, 307

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N.C. 576, 299 S.E.2d 645 (1983). I, therefore, believe the evidence and the law requires reversal of the Commission's decision.

The Commission, however, urges that a construction of § 105-394 to allow the County to recover property taxes and interest when Ms. Morgan had always paid her taxes promptly would be unfair. Yet, "[t]he duty of a court is to construe a statute as it is written. It is not the duty of a court to determine whether the legislation is wise or unwise, appropriate or inappropriate, or necessary or unnecessary." *Campbell v. First Baptist Church of the City of Durham*, 298 N.C. 476, 482, 259 S.E.2d 558, 563 (1979).

Further, the view of the Commission and the majority opinion overlooks the public policy advantages of construing the statute as written. As the North Carolina Association of County Commissioners explained in its brief:

Whatever the source or nature of the omission [to assess], the legislature has determined through G.S. § 105-394 that errors in listing and assessment are to be corrected when found. *This policy avoids the inequity of one property owner not being taxed on some or all of his or her property while all other property owners in that county are taxed.*

The policy also avoids any incentive on the part of the property owner to allow an assessment oversight to persist. That is, if a property owner knows that a listing or assessment error will be picked up sooner or later and that taxes will be due for the years in question, that property owner is more likely to bring any omission or other error to the attention of the county assessor's office.

Indeed, it has been the policy of the North Carolina Department of Revenue for years to encourage county assessors to correct all listings. *In this way, the tax rate for all taxpayers can be as low as possible.*

(Emphasis added.) It is the province of the General Assembly—and not this Court or the Property Commission—to determine whether these policies outweigh the unfairness to individual taxpayers.

Finally, the County also argues that the Commission erred in concluding the County was not entitled to interest on appellee's unpaid taxes. Taxes paid on or after their due date are "delinquent and are

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subject to interest charges.” N.C. Gen. Stat. § 105-360(a) (2005). As a general rule, “[a]ll assessments of tax . . . *shall* bear interest at the rate established pursuant to this subsection *from the time the tax was due* until paid.” N.C. Gen. Stat. § 105-241.1(i) (2005) (emphasis added). I see no basis for excluding tax assessments arising as a result of immaterial irregularities from this general rule. Indeed, although the majority reaches a different conclusion, Ms. Morgan does not seriously contest this issue.

In closing, it may well be troubling that a taxing authority can, under the immaterial irregularity provisions of N.C. Gen. Stat. § 105-394, go back 10 years to assess property that the authority has neglected to assess in a timely fashion through no fault of the taxpayer. Whether a County should be able to do so is, however, a question for the General Assembly and not for the courts. It is our responsibility to apply the statute as written.

STATE OF NORTH CAROLINA v. ANDREW JERMAINE JORDAN

No. COA07-69

(Filed 6 November 2007)

1. Burglary and Unlawful Breaking or Entering— first-degree burglary—motion to dismiss—sufficiency of evidence—felonious intent

The trial court did not err by denying defendant’s motion to dismiss the charge of first-degree burglary even though defendant contends the State’s evidence tended to show intent to murder but not to commit felonious assault as alleged in the indictment because there was substantial evidence for a reasonable mind to conclude that, at a minimum, defendant unlawfully entered the victim’s home with the intent to commit felonious assault even if this same evidence would also support an intent to murder theory.

2. Burglary and Unlawful Breaking or Entering— first-degree burglary—instruction—intent to feloniously assault

The trial court did not commit plain error in a first-degree burglary case by its instruction to the jury on an intent to feloniously assault theory even though defendant contends the evi-

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dence was only sufficient to demonstrate intent to murder, because the State presented sufficient evidence to support a finding of intent to feloniously assault.

3. Burglary and Unlawful Breaking or Entering— first-degree burglary—instruction—failure to instruct on lesser-included offense of felonious breaking and entering—nighttime

The trial court did not err in a first-degree burglary case by denying defendant's motion to instruct the jury on the lesser-included offense of felonious breaking and entering, because: (1) there was no conflict as to the time period in which the unlawful entry occurred; (2) the evidence showed that the breaking happened shortly before 6:49 p.m., and given the court took judicial notice that 5:21 p.m. marked the end of civil twilight that day, the State's uncontroverted evidence was sufficient to fully satisfy its burden of proving that the breaking and entering occurred at some point during the nighttime; and (3) defendant's denial alone was insufficient to negate the nighttime element.

4. Kidnapping— second-degree—instruction—plain error—evidence inconsistent with theory upon which jury was instructed

The trial court committed plain error in a second-degree kidnapping case by instructing the jury that defendant could be found guilty of kidnapping only if defendant restrained the victims for the purpose of committing first-degree burglary, and defendant is entitled to a new trial because: (1) the evidence showed that the burglary occurred before, not after, the kidnapping; and (2) the evidence is inconsistent with the theory upon which the jury was instructed.

5. Kidnapping— second-degree—instruction—plain error analysis—restrained—confined

The trial court did not commit plain error in a second-degree kidnapping case by its use of the term "restrained" while the indictment alleged "confined," because given the strength of the evidence against defendant, there was no reasonable basis to conclude that use of the word "confine" would have altered the jury's verdict. Since this type of error is likely to reoccur, the Court of Appeals noted that the terms "restrain" and "confine" are not synonymous. Instead, it concluded that evidence showing that the victims were held at gunpoint in the kitchen

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was sufficient to find that the victims were both “restrained” and “confined.”

6. Criminal Law— prosecutor’s argument—reasons to believe State’s evidence instead of vouching for credibility of witness

The trial court did not err in a first-degree burglary and second-degree kidnapping case by failing to intervene *ex mero motu* to strike portions of the State’s closing argument that a sheriff who testified for the State was an honest man and that he was not trying to convict somebody for something they didn’t do because: (1) while counsel may not personally vouch for the credibility of the State’s witnesses or for his own credibility, counsel may give the jurors reasons why they should believe the State’s evidence; and (2) the prosecutor’s argument is properly characterized as one giving the jurors reasons why they should believe the State’s evidence, as opposed to one personally vouching for the sheriff’s credibility.

Appeal by defendant from judgments entered 25 July 2006 by Judge J. Richard Parker in Perquimans County Superior Court. Heard in the Court of Appeals on 19 September 2007.

Attorney General Roy Cooper, by Assistant Attorney General Dahr Joseph Tanoury, for the State.

Appellate Defender Staple Hughes, by Assistant Appellate Defender Charlesena Elliott Walker, for defendant appellant.

McCULLOUGH, Judge.

Defendant Andrew Jermaine Jordan (“defendant”) was tried before a jury at the 24 July 2006 Criminal Session of Perquimans County Superior Court after being charged with one count of first-degree burglary, one count of second-degree kidnapping, and one count of first-degree attempted armed robbery. The State’s evidence tended to show the following: On 12 December 2003, Kathy Turner, Kelly Palmer, and Dana Hayes were visiting with each other at Dana Hayes’s residence, located at 388 Chinquapin Road. Kathy Turner had recently finished watching her grandchild at her daughter’s house, which is across the street from Hayes’s residence, and it was turning dark at the time her daughter came home from work.

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Turner, Palmer, and Hayes had been sitting at the kitchen table with an infant in a carrier on the floor between them when Rashie Bellfield, Christopher Hinton, Quinton Porter, and defendant suddenly kicked open a locked door and entered the house.¹ The men were wearing hoods and ski masks. Chris Hinton and Quinton Porter were carrying guns.

The men ordered the group, at gunpoint, to get down on the ground in the kitchen. At one point, one of the men held a gun to the infant's head, threatening to kill the child if the group did not cooperate.

While Turner, Palmer, and Hayes were held in the kitchen, one man went down the hall toward the back of the house. Bellfield testified at trial that the men had entered the house intending to "kill someone" in particular, but quickly discovered that they were in the wrong house. After this realization, the men fled to their car. Palmer immediately called 911, and Turner headed to her daughter's house across the street. Turner testified that she was too upset to notice the lighting conditions when she left the Hayes's residence. Turner's son-in-law, who was in his yard across the street, saw the men's vehicle leaving.

At 6:49 p.m., Officer Larry Chamblee of the Perquimans County Sheriff's Department received a call, reporting the incident and describing the perpetrators' vehicle. The police subsequently spotted the vehicle, and a high speed chase ensued. The perpetrators' car lost control and crashed into a wooded area. Three of the men ran from the car, but defendant remained seated in the backseat.

At the police station, in the presence of Perquimans County Sheriff Tilley and Probation Officer Long, defendant voluntarily prepared an unsigned, written statement, corroborating the events described above and confirming that defendant did enter Hayes's residence.

At the close of the State's evidence, the defense moved for a directed verdict on all three charges. The trial court granted the motion with respect to the charge of first-degree attempted armed robbery, but denied the motions regarding first-degree burglary and second-degree kidnapping.

1. The State presented conflicting evidence as to whether defendant was one of the men who entered the residence. At trial, Kathy Turner testified that four men entered Dana Hayes's residence, but in a statement to Officer Chamblee, Turner only reported three men. Rashie Bellfield testified that defendant never entered the residence.

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Defendant's evidence tended to show the following: On 12 December 2003, Christopher Hinton agreed to drive defendant to Chowan Hospital so that he could visit with his sister and sick nephew. Bellfield and Porter were also in the car. Defendant had just met Hinton, but was well acquainted with Bellfield, who had a child with defendant's sister, and Porter, whom he had known since childhood. During the car ride, there was no conversation about robbing a house or about killing anyone. Defendant did not see any ski masks or guns in the car. After stopping for gas, Hinton told defendant that they needed to stop by Hinton's house. They arrived at a house with which defendant was unfamiliar, and Hinton, Bellfield, and Porter got out of the car and opened the trunk, stating that they would be back shortly. Defendant remained in the car.

Soon after, at around 6:00 p.m., Hinton, Bellfield, and Porter came running back to the car. Defendant asked what had happened, but the men did not answer. Next, the car was spotted by the police, a high-speed chase ensued, and the car crashed into a ditch. Defendant testified that the reason he chose not to run from the police was because he knew he had done nothing wrong. Defendant testified that the police had fabricated the written statement admitted into evidence by the State.

Defendant was found guilty of first-degree burglary and second-degree kidnapping. He received consecutive terms of imprisonment of 87 to 124 months.

On appeal, defendant argues that the trial court erred by: (1) denying defendant's motion to dismiss the first-degree burglary charge; (2) improperly instructing the jury with respect to both the first-degree burglary charge and the second-degree kidnapping charge; and (3) failing to strike portions of the State's closing argument.

I. Motion to Dismiss

[1] Defendant first contends that the trial court erred in denying his motion to dismiss the first-degree burglary charge.

In ruling on a motion to dismiss, the trial judge must consider the evidence in the light most favorable to the State, allowing every reasonable inference to be drawn therefrom. *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992). The court must find that there is substantial evidence of each element of the crime charged and of the defendant's perpetration of such crime. *Id.* "Substantial evidence is

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relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” *Id.*

The elements of first-degree burglary are: (1) the breaking, (2) and entering, (3) in the nighttime, (4) into a dwelling house or sleeping apartment of another, (5) which is actually occupied at the time of the offense, (6) with the intent to commit a felony therein. *State v. Barnett*, 113 N.C. App. 69, 74, 437 S.E.2d 711, 714 (1993). The actual commission of the intended felony is not an essential element of the crime. *State v. Bell*, 285 N.C. 746, 208 S.E.2d 506 (1974).

In the case at hand, the indictment alleged, *inter alia*, that, at the time of the breaking and entering, defendant intended to commit felonious assault. Defendant contends that while the State’s evidence tended to show intent to murder, it did not show intent to feloniously assault, as alleged in the indictment, and was thus insufficient to satisfy the felonious intent element of the first-degree burglary charge. We disagree.

Under North Carolina General Statutes, a person is guilty of felonious assault where he (1) commits an assault on another, (2) with a deadly weapon, (3) with intent to kill. N.C. Gen. Stat. § 14-32(c) (2005). Common law assault is “ ‘an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force . . . must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm.’ ” *State v. Roberts*, 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967) (citation omitted).

Viewed in the light most favorable to the State, the evidence tended to show that defendant and three conspirators kicked down the front door of Dana Hayes’s house, wearing ski masks and carrying loaded guns. While inside the house, the men terrorized and assaulted its occupants, pointing guns at them and threatening to “blow [their] heads off.” Bellfield specifically testified that the men entered the home intending to kill at least one person and that they only abandoned their plan upon discovering that they had entered the wrong house. We agree with the State that there was substantial evidence for a reasonable mind to conclude that, at a minimum, defendant unlawfully entered Dana Hayes’s home with the intent to commit felonious assault, though this same evidence would also support an intent to murder theory. Therefore, the trial court properly denied defendant’s motion to dismiss the first-degree burglary charge.

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II. Jury Instructions

Defendant makes several assignments of error to the jury instructions.

A. First-degree Burglary Charge

[2] Defendant first contends that the trial judge erred in instructing the jury on an intent to feloniously assault theory, where the evidence was only sufficient to demonstrate intent to murder. For the reasons previously discussed, we disagree.

Defendant did not object to this instruction at trial, and therefore, asks this Court for plain error review. “Under a plain error analysis, defendant is entitled to a new trial only if the error was so fundamental that, absent the error, the jury probably would have reached a different result.” *State v. Jones*, 355 N.C. 117, 125, 558 S.E.2d 97, 103 (2002).

“The trial court’s jury instructions on possible theories of conviction must be supported by the evidence.” *State v. Osborne*, 149 N.C. App. 235, 238, 562 S.E.2d 528, 531, *aff’d*, 356 N.C. 424, 571 S.E.2d 584 (2002). As previously discussed, the State presented sufficient evidence to support a finding of intent to feloniously assault. Therefore, there was no error in instructing the jury on that theory.

[3] Next, defendant contends that, because there was conflicting evidence as to whether defendant entered Hayes’s residence during the nighttime, the trial court committed reversible error in denying defendant’s motion to instruct the jury on the lesser included offense of felonious breaking and entering. Because we find no conflict as to the time period in which the unlawful entry occurred, we disagree.

“‘[N]ecessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The *presence of such evidence* is the determinative factor.’” *State v. Collins*, 334 N.C. 54, 58, 431 S.E.2d 188, 191 (1993) (emphasis in original) (quoting *State v. Hicks*, 241 N.C. 156, 159, 84 S.E.2d 545, 547 (1954)). Where the State’s evidence is sufficient to fully satisfy its burden of proving each element of the greater offense and defendant’s denial that he committed the offense is the only evidence to negate those elements, the defendant is not entitled to an instruction on the lesser offense. *State v. Smith*,

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351 N.C. 251, 267-68, 524 S.E.2d 28, 40, *cert. denied*, 531 U.S. 862, 148 L. Ed. 2d 100 (2000).

“The law considers it to be nighttime when it is so dark that a man’s face cannot be identified except by artificial light or moonlight.” *State v. Garrison*, 294 N.C. 270, 279, 240 S.E.2d 377, 383 (1978) (quoting *State v. Frank*, 284 N.C. 137, 145, 200 S.E.2d 169, 175 (1973)). As our Supreme Court did in *Garrison*, we take judicial notice that in Chowan County on 12 December 2003, the sun set at 4:52 p.m., and the end of civil twilight occurred at 5:21 p.m. See the schedule for “Sunrise and Sunset” computed by the Nautical Almanac Office, United States Naval Observatory. *See also* N.C. Gen. Stat. § 8C-1, Rule 201(f) (providing that a court may take judicial notice at any stage of a proceeding).

The uncontroverted evidence in the record shows that Turner’s daughter had already come home from work at the health department by the time the unlawful entry occurred; the perpetrators were only in Hayes’s residence for a brief time before discovering their mistake and fleeing the scene; the victims contacted the police immediately after the perpetrators left the residence; and Officer Chamblee received a phone call reporting the incident at 6:49 p.m. Thus, the evidence clearly shows that the breaking happened shortly before 6:49 p.m. Given that 5:21 p.m. marked the end of civil twilight, we find the State’s uncontroverted evidence sufficient to fully satisfy its burden of proving that the breaking and entering occurred well after 5:21 p.m., at some point during the nighttime.

While Turner testified that she was too upset to notice the lighting conditions after the breaking and entering occurred, she testified that it was turning dark before she went over to Hayes’s house. Turner’s testimony is wholly consistent with the time line established by Officer Chamblee’s phone records and does not tend to establish that it was daytime when the unlawful entry occurred. The only evidence tending to support a finding that the unlawful entry occurred in the daytime is defendant’s testimony that the men returned to their car at about 6:00 p.m, when it was “just turning dark.” Defendant’s denial alone, however, is insufficient to negate the nighttime element. There is no other evidence in the record from which a juror could rationally find that the incident occurred prior to 5:21 p.m., which marked the end of civil twilight. Therefore, we find no error in the trial judge’s decision not to instruct on the lesser included offense of felonious breaking and entering.

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B. Kidnapping Charge

[4] Defendant next assigns plain error to the trial court's instruction that, in order to find defendant guilty of second-degree kidnapping, the jury must find that defendant "unlawfully restrained a person . . . for the purpose of facilitating the Defendant's commission of first degree burglary[.]" Defendant contends that the evidence did not support the giving of this instruction. We agree.

Under North Carolina General Statutes, to be guilty of kidnapping, a defendant must "unlawfully confine, restrain, or remove from one place to another, any person 16 years of age or over without the consent of such person" for one of four specified purposes, including "[f]acilitating the commission of any felony[.]" N.C. Gen. Stat. § 14-39(a)(2) (2005). Where the victim is released to a safe place and is not seriously injured or sexually assaulted, the defendant is guilty of second-degree kidnapping. N.C. Gen. Stat. § 14-39(b).

It is well settled that an indictment under N.C. Gen. Stat. § 14-39(a)(2) need not allege the exact type of felony furthered by the restraint or confinement, and any additional language such as "rape or robbery" in the indictment is harmless surplusage, which may properly be disregarded. *State v. Moore*, 284 N.C. 485, 493, 202 S.E.2d 169, 174 (1974). However, it is plain error to allow a jury to convict a defendant upon a theory not supported by the evidence. *See State v. Tucker*, 317 N.C. 532, 539-40, 346 S.E.2d 417, 422 (1986); *State v. Brooks*, 138 N.C. App. 185, 190-92, 530 S.E.2d 849, 852-53 (2000). This Court has recognized that the felony that is the alleged purpose of the kidnapping must occur after the kidnapping. *Id.* at 192, 530 S.E.2d at 854; *State v. Brodie*, 171 N.C. App. 363, 615 S.E.2d 97, *disc. review denied*, 360 N.C. 67, 621 S.E.2d 881 (2005).

In this case, the trial court instructed the jury that defendant could be found guilty of kidnapping only if defendant restrained the victims for the purpose of committing first-degree burglary. The court did not instruct as to any other possible purpose. Defendant argues that the evidence shows that, if any burglary occurred, it was completed before the restraint, and therefore, the jury instruction was unsupported by the evidence. We agree.

"The elements of first-degree burglary are: (i) the breaking (ii) and entering (iii) in the nighttime (iv) into the dwelling house or sleeping apartment (v) of another (vi) which is actually occupied at the time of the offense (vii) with the intent to commit a felony therein." *State v. Singletary*, 344 N.C. 95, 101, 472 S.E.2d 895, 899

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(1996). In this case, the burglary was complete as soon as defendant kicked down the front door and entered Hayes's residence with the intent to murder; whereas, the kidnapping was not complete until the defendant and his accomplices unlawfully restrained the victims by ordering them at gunpoint to lie on the ground. Thus, the evidence shows that the felony that is the only alleged purpose for the kidnapping occurred before, not after, the kidnapping; the evidence is, thus, inconsistent with the theory upon which the jury was instructed.

The State contends that evidence of defendant's walking down the hall toward the back of the house supports an inference that defendant was searching for property to steal and that the burglary was, thus, on-going in nature, occurring after the victims had been restrained. Given that the State conceded at trial that any evidence of intent to steal was insufficient to support the attempted armed robbery charge and, accordingly, the trial judge granted a directed verdict with respect to that charge, we find this argument unpersuasive.

We cannot uphold a jury verdict based upon a theory that is not supported by the evidence. The instruction as to the kidnapping charge constitutes plain error, and defendant must receive a new trial with respect to this charge. *Tucker*, 317 N.C. 532, 540, 346 S.E.2d 417, 422.

[5] Although the kidnapping conviction cannot stand, we note that defendant also assigns plain error to the jury instruction's use of the term "restrained," while the indictment alleged "confined." Given the strength of the evidence against defendant, we find no reasonable basis to conclude that use of the word "confine" would have altered the jury's verdict, and this instructional error would not have constituted plain error. However, because this type of error is likely to reoccur, we note that the terms "restrain" and "confine" are not synonymous. Instead, we conclude that evidence showing that the victims were held at gunpoint in the kitchen was sufficient to find that the victims were both "restrained" and "confined." See *State v. Gainey*, 355 N.C. 73, 95, 558 S.E.2d 463, 478, *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165 (2002), (recognizing that "the term 'confine' connotes some form of imprisonment within a given area, such as a room, a house or a vehicle. The term 'restrain,' while broad enough to include a restriction upon freedom of movement by confinement, connotes also such a restriction, by force, threat or fraud, without a confinement.'") *Id.* (citation omitted). Nonetheless, the kidnapping conviction cannot stand due to plain error in the trial court's instruction on the felonious purpose element.

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III. Closing Argument

[6] Finally, defendant contends that the prosecutor improperly vouched for the credibility of the State's witness during closing argument. The pertinent portion of the prosecutor's argument relates to the credibility of Sheriff Tilley's testimony concerning defendant's unsigned, written statement. The prosecutor argued, "[W]e contend that the Sheriff is an honest man and he has told you what happened. He's not trying to convict somebody for something they didn't do. He wouldn't want to do that. He is the elected Sheriff of this county." Because defendant did not object to the closing argument at trial, we review to determine whether the remarks were so grossly improper that the trial court committed reversible error in failing to intervene *ex mero motu*. *State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998), *cert. denied*, 528 U.S. 835, 145 L. Ed. 2d 80 (1999). "To establish such an abuse, defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999). In determining whether an argument is grossly improper, we must examine the context in which it was given and the circumstances to which it refers. *See State v. Cummings*, 353 N.C. 281, 297, 543 S.E.2d 849, 859, *cert. denied*, 534 U.S. 965, 151 L. Ed. 2d 286 (2001). Under this standard, we find that the prosecuting attorney's argument did not require the court to intervene *ex mero motu*.

"It is well settled that the arguments of counsel are left largely to the control and discretion of the trial judge and that counsel will be granted wide latitude in the argument of hotly contested cases." *State v. Williams*, 317 N.C. 474, 481, 346 S.E.2d 405, 410 (1986). To that end, counsel are permitted to argue the evidence presented and all inferences reasonably drawn therefrom. *Id.* "Even so, counsel may not, by argument . . . , place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs, and personal opinions not supported by the evidence." *State v. Britt*, 288 N.C. 699, 711, 220 S.E.2d 283, 291 (1975).

Our Supreme Court has recognized that while counsel may not personally vouch for the credibility of the State's witnesses or for his own credibility, counsel may give the jurors reasons why they should believe the State's evidence. *State v. Bunning*, 338 N.C. 483, 489, 450 S.E.2d 462, 464 (1994) (concluding that a prosecutor's argument that a law enforcement officer would not risk his professional reputation merely to convict the defendant was proper); *State v. Rogers*, 355

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N.C. 420, 453, 562 S.E.2d 859, 880 (2002), *cert. denied*, 360 N.C. 294, 629 S.E.2d 283 (2006) (finding no impropriety in prosecutor's argument that the State's witness had no "axe to grind" or reason to lie).

Likewise, we conclude that the prosecutor's argument is properly characterized as one giving the jurors reasons why they should believe the State's evidence, as opposed to one personally vouching for the sheriff's credibility. As such, the argument did not require the court to intervene *ex mero motu*.

Based on the foregoing, we find no error in defendant's conviction of first-degree burglary. We reverse the trial court's judgment regarding defendant's conviction of second-degree kidnapping.

Reversed in part, no error in part.

Judges CALABRIA and STEPHENS concur.

STATE OF NORTH CAROLINA v. TAD WILLIAM DEXTER, DEFENDANT

No. COA06-1611

(Filed 6 November 2007)

1. Search and Seizure— child pornography—probable cause for warrant—evidence sufficient

There was sufficient evidence for probable cause for a search warrant in a child pornography case where the evidence which defendant challenged was not the only evidence offered.

2. Search and Seizure— search warrant—child pornography—delay from tip to warrant

The time between the date a tip was received in a child pornography case and the issuance of a search warrant was not excessive. The person delivering the tip indicated that she had made copies of everything on defendant's computer, all of the evidence stated in the affidavit was obtained within twenty-four hours of the tip, and it was apparent that investigators waited for verification by an Internet service provider that a profile belonged to defendant.

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3. Search and Seizure— probable cause for warrant—child pornography—reliability of informant

An informant was correctly found to be a reliable source for information leading to a search warrant despite her use of a variation of her name which was not widely known and her subsequent recantation.

4. Search and Seizure— warrant application—no inconsistency

There was no inconsistency in statements by an officer in a search warrant application that criminal computer users hide their files and that an informant living in the house would have had a reasonable opportunity to view images on defendant's screen. Furthermore, although defendant rejects the officer's explanation for the informant's recantation, the informant's e-mail clearly stated that she was afraid of defendant.

5. Sexual Offenses— child pornography—exploitation of minor—elements

There are two requirements for the offense of third-degree sexual exploitation of a minor: knowledge of the character or content of the material, and possession of material that contains a visual representation of a minor engaging in sexual activity. There is no requirement of "knowing possession" of child pornography.

6. Obscenity— child pornography—possession—sufficiency of evidence

The State presented sufficient evidence to prove that defendant was in possession of child pornography, and that defendant was the person in the house who collected child pornography.

Appeal by defendant from judgment entered 13 July 2006 by Judge John E. Nobles, Jr., in Pamlico County Superior Court. Heard in the Court of Appeals 23 August 2007.

Roy Cooper, Attorney General, by Assistant Attorney General Chris Z. Sinha for the State.

Staples S. Hughes, Appellate Defender, by Assistant Appellate Defender Barbara S. Blackman for the defendant.

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ELMORE, Judge.

On 13 July 2006, a jury found Tad William Dexter (defendant) guilty of nine counts of third-degree sexual exploitation of a minor. The trial judge sentenced defendant to several suspended sentences of six to eight months, an active sentence of sixty days, intensive supervision for six months, and thirty-six months of supervised probation. Defendant appeals the trial court's denial of a motion to suppress and a motion to dismiss.

On 3 August 2003, an individual who identified herself as Mary Watson submitted the following text to the FBI from the e-mail address sandall_66@yahoo.com:

There is a Yahoo group called "hssp" that is actually child porn all the way. It is actually "groups.yahoo.com/group/hsppp." I have reported this group to <https://web.cybertip.org/cyberTipIIhtml> to see if they can do anything about it. The user is someone I know. It makes me sick and I will continue to do whatever I can to stop this sick sick practice. The user name is "hard_one_in_hand2002." He is a 42 year old male who (according to his Internet files) loves to look at young girls. This guy has to be stopped—he makes me sick. He and I currently share a house and should he find out I reported this, I do not know what he would do. His name is Tad Dexter—he lives [in] Oriental, NC. I am afraid of him. . . . I have copied most of the cd's he has downloaded pictures on. If anyone calls me, please be careful as to how a message is left. He is planning on reformatting his computer soon. I know he joined a paysite called www.lolitateen.com the other day. He is really a sick man. I can only image [sic] what he will do should he find out this information came from me. He runs a business in this community and has made several remarks to me about some of his customers' daughters (15 & 16 year olds). Thanks for your help.

The FBI attempted several times to contact Mary Watson using the telephone number that she had included with her e-mail. The FBI later learned that Mary Watson goes by "Lisa," her middle name,¹ and worked at a restaurant in Pamlico County. The FBI contacted Lisa Watson at the restaurant on 15 August 2002, and Watson told the FBI that she had not filed a complaint against her boyfriend, that she did not know if he possessed child pornography, that she had not heard

1. Watson's full name at the time of trial was Mary Elizabeth Sandall Rush. She had re-married and taken her husband's last name, Rush.

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of the profile “hard_one_in_hand2002,” and was unaware of any Yahoo groups trading in child pornography. However, Watson verified that her e-mail address was sandall_66@yahoo.com and that her boyfriend was Tad Dexter.

Later on 15 August 2002, the FBI learned the following: (1) a Yahoo profile of “hard_one_in_hand2002” did exist and had been modified that day; (2) the website www.lolitateens.com existed and declared itself to have “the youngest barely legal teens!”; (3) defendant resided at the address given by Watson in her e-mail; (4) defendant was forty-two years old on 3 August 2002; (5) defendant had been arrested for a number of sexual crimes in New Jersey, North Carolina, and Virginia, including indecent exposure, obscene literature and exhibitions, assault on a female, and indecent liberties with a child.

The North Carolina State Bureau of Investigation (the SBI) issued a subpoena to Yahoo for subscriber information on the login name, hard_one_in_hand@yahoo.com.” On 23 September 2002, Yahoo told the SBI that the login name was issued to “Tad Dexter of Oriental, North Carolina, 28571.”

SBI Special Agent Hans J. Miller submitted an affidavit for a search warrant to search defendant’s residence for evidence of minors visually depicted while engaged in sexually explicit conduct.² In his explanation of probable cause, Special Agent Miller stated that he believed that Mary Watson and Lisa Watson were the same person because investigators were able to verify most of the facts that she gave in her e-mail. Special Agent Miller explained that, based on his training and experience, he knew that “it is common for witnesses in a domestic situation to recant reports or disclosures of criminal activity in order to protect the criminal offender.”

Agents from the SBI, the FBI, and officers from the Pamlico County Sheriff’s Department and Craven County Sheriff’s Office searched defendant’s home on 2 October 2002. Defendant shared his home with Watson and two of her children, and each of the four inhabitants had a computer. Special Agent Miller observed that defendant’s computer, located in his bedroom, was still running when they entered the home. Several chat windows were open, and one of the chat dialogues showed that “T. W. Dexter” had written, “thanks for the pics” or “thanks for the pictures.” There was a picture layered underneath the chat windows, which Special Agent Miller described as “a picture of what appeared to be an under age girl, under 18, in a

2. We refer to such materials generally as “child pornography.”

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spread eagle position lying on a couch with her legs spread open and her arms back. She was wearing skimpy underwear, possibly could be a thong.” Special Agent Miller noted that the time displayed on the computer screen was within a few minutes of the actual time according to his watch.

The officers seized three computer towers, a hard disk drive, CDs and CD cases, VHS tapes, a plastic bag containing marijuana, marijuana paraphernalia, floppy disks, a printed web page, a note with handwritten passwords, a lock box with key and contents, a CD entitled “personal movies,” and a digital disk drive from inside defendant’s computer. The officers recovered a large number of images of suspected child pornography, but did not file charges based on those images because the State was not certain that the individuals in the photographs were under age.

The State ultimately filed charges based on eighteen images recovered from defendant’s computer. These images were all temporary Internet files stored in a temporary Internet folder. Special Agent Miller testified that if one receives an image by e-mail through a regular e-mail client (*e.g.*, Outlook), the image files do not normally become temporary Internet files. This may happen if one uses a web-based e-mail client such as Yahoo or AOL, through which one accesses e-mail through a website. If one received a link to a website via e-mail or chat, a temporary Internet file is only created if the user clicks on the link and visits the website.

Some of the image files were found in active temporary Internet folders, which defendant could have accessed at any time. Other image files were found in the “recovered folders” of defendant’s hard drive using forensic software. Special Agent Miller explained that “when you take a hard drive and reformat it and it had contained data, forensic software allows you to recover the data that was once there” but is “not easily seen by someone without specialized software.” The time stamps on the image files from the recovered folders of defendant’s hard drive indicate that the images were viewed in late September of 2002.

I. The Motion to Suppress

[1] Defendant first argues that the trial court erred by denying defendant’s motion to suppress the use of any evidence obtained pursuant to the search warrant issued 2 October 2002. He contends that the affidavit prepared by Special Agent Miller and signed by Judge

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Charles Henry did not establish probable cause for the search of defendant's home. We disagree.

"[I]n reviewing the trial court's order following a motion to suppress, we are bound by the trial court's findings of fact if such findings are supported by competent evidence in the record; but the conclusions of law are fully reviewable on appeal." *State v. Smith*, 346 N.C. 794, 797, 488 S.E.2d 210, 212 (1997). We employ a totality of the circumstances analysis to review the affidavit and warrant. *Illinois v. Gates*, 462 U.S. 213, 238, 76 L. Ed. 2d 527, 548 (1983) (citations omitted).

The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed.

Id. at 238-39, 76 L. Ed. 2d at 548 (citations, quotations, and alterations omitted). "In adhering to this standard of review, we are cognizant that 'great deference should be paid [to] a magistrate's determination of probable cause and that after-the-fact scrutiny should not take the form of a *de novo* review.'" *State v. Pickard*, 178 N.C. App. 330, 334-35, 631 S.E.2d 203, 207 (2006) (quoting *State v. Arrington*, 311 N.C. 633, 638, 319 S.E.2d 254, 258 (1984)).

Defendant contends that there was insufficient evidence to support Judge Henry's finding of probable cause because investigators did not verify the existence of every child pornography Internet group that Watson alleged that defendant belonged to, and did not verify that those groups contained illegal child pornography. Defendant appears to argue that this is a case of first impression for this Court. He argues that other courts are split as to whether membership in a child pornography group is sufficient probable cause for a search warrant. Defendant cites two federal cases that held that mere membership in a child pornography group is insufficient to provide probable cause. However, in those two cases, law enforcement did not list on the affidavits other evidence linking the defendants to possession of child pornography. *See United States v. Strauser*, 247 F. Supp. 2d 1135, 1137 (E.D. Mo. 2003) (stating that the search warrant application included evidence that the defendant was a registered member of

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an Internet child pornography group, had a sexually explicit screen name, and the defendant's address); *United States v. Perez*, 247 F. Supp. 2d 459, 462-63 (S.D.N.Y. 2003) ("The nine homes were included in the search warrant application because e-mail addresses for subscribers to the Candyman Egroup were registered to individuals who resided at those locations."). In this case, defendant's membership in the group "www.lolitateens.com" was not the only evidence offered to support a finding of probable cause. Indeed, the Fourth Circuit distinguished *Strauser* and *Perez* from a case in which other evidence supported a finding of probable cause, stating that "cross-weighting of the elements underpinning a probable cause determination is precisely what the 'totality-of-the-circumstances' test invites." *United States v. Ramsburg*, 114 Fed. Appx. 78, 81-82 (4th Cir. 2004) (citation omitted) (unpublished).

Defendant also states, without legal authority, that defendant's "criminal history was too remote in time to establish probable cause." Again, defendant's criminal history was not the sole basis for the finding of probable cause.

[2] Defendant contends that too much time passed between the date that the FBI received the tip from Watson and the date that the warrant was issued. He argues that it was not reasonable to assume that the incriminating material would still be on defendant's computer two months after the tip was received because Watson had said that defendant would reformat his hard drive "soon," thereby erasing the evidence. This argument also lacks merit. In her e-mail to the FBI, Watson specifically wrote that she had made copies of everything on defendant's computer, negating the imminent threat of a reformatted hard drive. Furthermore, investigators obtained all of the evidence stated on the affidavit within twenty-four hours of Watson's tip, except for verification by Yahoo that the profile, "hard_one_in_hand2002," belonged to defendant. It is apparent that investigators were waiting for this verification by Yahoo before proceeding with the affidavit.

[3] Defendant then postulates that the State should not have found Watson to be a reliable informant because she gave the tip using a variation of her name by which she is not widely known, and then recanted before the determination of probable cause. This postulation fails for a number of reasons. First, the name that Watson gave was composed of her first name and her last name. Although Watson is more commonly known as Lisa, use of her first name is hardly grounds to find her unreliable. Second, Watson used an e-mail

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address that included one of her middle names, and admitted that the e-mail address was hers, even after denying sending the tip. Third, investigators verified most of the information that Watson set forth in her e-mail, thereby bolstering her reliability despite her subsequent recantation.

[4] Defendant next asserts that Special Agent Miller relied on speculation to establish probable cause. Defendant points to a supposed internal inconsistency within Special Agent Miller's affidavit: Special Agent Miller first stated that criminal computer users hide their files and then stated that Watson would have had reasonable opportunity to view images on defendant's screen. There is no inconsistency in these statements; defendant may hide his files, but Watson could still have seen what was displayed on the screen while he was accessing those files because she lived in the same home. Defendant also rejects Special Agent Miller's explanation for Watson's recantation because "nothing in the affidavit suggested that any 'domestic situation' existed." Watson's e-mail to the FBI clearly states that she is afraid of defendant.

Looking at the totality of the circumstances, we hold that the affidavit in support of the search warrant for defendant's home established probable cause. The FBI confirmed the easily verifiable information from Watson's tip, which increased Watson's credibility as an informant, even after she denied sending the tip. *See State v. Bone*, 354 N.C. 1, 10-11, 550 S.E.2d 482, 488 (2001) ("[The detective] was able to corroborate almost all of the information in the anonymous tip, including defendant's name, age, race, marital status, criminal status, and area of employment, as well as the street on which the victim lived These indicia of reliability gave credibility to the anonymous tipster.") (citation omitted). Accordingly, it was reasonable for the investigators and Judge Henry to believe that Watson was being truthful in her other allegations about defendant and the criminal materials in his home. In addition to the evidence offered by Watson and verified by the FBI, defendant had a criminal record that included sexual crimes.

II. The Motion to Dismiss

[5] Defendant next argues that the trial court erred by denying his motion to dismiss because the State failed to establish "knowing possession" of child pornography.

Our review of the trial court's denial of a motion to dismiss is well understood. "[W]here the sufficiency of the evidence . . .

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is challenged, we consider the evidence in the light most favorable to the State, with all favorable inferences. We disregard defendant's evidence except to the extent it favors or clarifies the State's case."

State v. Herring, 176 N.C. App. 395, 398, 626 S.E.2d 742, 744-45 (2006) (quoting *State v. James*, 81 N.C. App. 91, 93-94, 344 S.E.2d 77, 79-80 (1986)).

When a defendant moves for dismissal, the trial court must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. Substantial evidence is that evidence which a reasonable mind might accept as adequate to support a conclusion.

State v. Watkins, 181 N.C. App. 502, 509, 640 S.E.2d 409, 414 (2007) (citations, quotations, and alterations omitted).

Defendant mischaracterizes the statute under which defendant was prosecuted, N.C. Gen. Stat. § 14-190.17A(a). Defendant states that the section "provides that a person commits third-degree sexual exploitation of a child if he knowingly 'possesses material that contains a visual representation of a minor engaging in sexual activity.'" This is not an accurate statement of the law. There is no requirement of "knowing possession" of child pornography as defendant argues in his brief. There are two requirements for the offense of third degree sexual exploitation of a minor: (1) knowledge of the character or content of the material, and (2) possession of material that contains a visual representation of a minor engaging in sexual activity. N.C. Gen. Stat. § 14-190.17A(a) (2005).

[6] Setting aside defendant's misstatement of the law, we focus on whether the State presented sufficient evidence to prove that defendant was *in possession* of the materials. Defendant does not argue that he was unaware of the character or content of the materials, so we do not address that prong of the statute.

At trial, the prosecutor and defense counsel used the same definition of "possession": a "person possesses when he's aware of its presence and has himself or together with others both the power and intent to control the disposition of that material."³ That definition

3. The quoted text was stated by defense counsel at trial. The prosecutor said, "The judge will tell you that possession is when he is aware of its presence and has both the power and intent to control the disposition of that material." The judge did instruct the jury to that effect, reciting the exact language used by defense counsel.

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was not at issue during the trial. The judge instructed the jury to use that definition of “possession” in its deliberations.

Viewing the evidence in the light most favorable to the State, it is clear that the State presented substantial evidence that defendant was in possession of the child pornography: defendant had written in a chat dialogue, “thanks for the pics” or “thanks for the pictures,” and several files bore date stamps that matched the date stamp on the chat; Watson testified that defendant showed her how to erase temporary Internet files and how to access temporary Internet files offline; Watson testified that defendant had a habit of frequently erasing his temporary Internet files and reformatting his hard drive; this testimony was corroborated by the image files retrieved from the “recovered folders” of defendant’s hard drive, all bearing dates within ten days of the search, suggesting that defendant had purposefully deleted those files or reformatted his hard drive within a few days of the search; and Special Agent Miller testified that the image files could not have become temporary Internet files without defendant first viewing them. The evidence shows that defendant knew exactly what temporary Internet files were, purposefully stored child pornography as temporary Internet files, revisited those files offline, and purposefully and habitually deleted those temporary Internet files so that he would avoid being caught with too many at once. Defendant clearly had the power and intent to control the disposition of the images.

Defendant also posits that the State did not establish that defendant was the individual who caused the images to be deposited on the hard drive and that Lisa Watson was the person in the household who collected child pornography. We are not dissuaded from our position that the State adequately proved that defendant had possession of the images. The images were found on defendant’s computer. Defendant chose the user name “hard_one_in_hand.” Defendant gave Special Agent Miller a receipt showing that he had joined the pay site “www.teenteen.com.” Defendant admitted that he visited child pornography news groups. Defendant was at home alone when the officers executed their search warrant,⁴ and a review of his temporary Internet files showed that he had acquired ten of the images within one hour of the officers’ arrival and even thanked the sender.

4. Lisa Watson had left for work several hours earlier.

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Accordingly, we hold that the trial court did not err by denying defendant's motion to suppress and defendant's motion to dismiss. Defendant received a trial free from error.

No error.

Judges STEELMAN and STROUD concur.

STATE OF NORTH CAROLINA v. ROBERT J. PETRICK

No. COA07-86

(Filed 6 November 2007)

1. Criminal Law— pro se representation—appropriate safeguards

The trial court did not err by allowing defendant to represent himself pro se. The trial court engaged in the appropriate statutory inquiry and safeguards for defendant's election to proceed pro se.

2. Appeal and Error— preservation of issues—objection not renewed—plain error not argued

An assignment of error concerning cadaver dog evidence was dismissed due to defendant's failure to properly preserve and present it or to request plain error review.

3. Evidence— hearsay—murder victim's statements—present sense impressions

There was no plain error in a murder prosecution in the admission of testimony about a murder victim's statements concerning her financial situation and that defendant had choked her after she had confronted him about their finances. This was the victim's present sense impression; there is not a rigid rule about the timing of "immediately thereafter."

4. Evidence— hearsay—murder victim's statements—relevant to relationship with defendant and state of mind

The trial court did not abuse its discretion in a murder prosecution by admitting testimony about a murder victim's statements. The statements were not offered to prove the truth of the

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matter, but were relevant to the victim's relationship with defendant, defendant's motive, and the victim's state of mind.

5. Evidence— prior crimes or bad acts—relevancy to motive

The trial court properly admitted evidence in a murder prosecution about defendant's prior acts of dishonesty and bad character. The evidence tended to show defendant's motive, intent, preparation, plan, absence of mistake, and knowledge. The relevancy outweighs the risk of prejudice.

6. Criminal Law— breakdown of adversarial process—pro se defendant

An assignment of error to the breakdown of the adversarial process by a defendant who represented himself was overruled. A defendant who represents himself cannot complain that the quality of his defense amounts to ineffective assistance of counsel.

Appeal by defendant from judgment entered 29 November 2005 by Judge Orlando F. Hudson, Jr., in Durham County Superior Court. Heard in the Court of Appeals 10 October 2007.

Attorney General Roy Cooper, by Assistant Attorney General John G. Barnwell and Assistant Attorney General Daniel P. O'Brien, for the State.

Mark Montgomery, for defendant-appellant.

TYSON, Judge.

Robert J. Petrick ("defendant") appeals from judgment entered after a jury found him to be guilty of first-degree murder pursuant N.C. Gen. Stat. § 14-17. We find no error.

I. Background

On 22 January 2003, defendant reported his wife, Janine Sutphen ("the victim"), to be missing after she failed to return home from a practice with the North Carolina Symphony. Officers found the victim's car parked in a parking deck located across the street from where the North Carolina Symphony had practiced. No signs of a struggle were apparent inside or around the victim's car.

Four months later, on 29 May 2003, the victim's body floated to the surface of Falls Lake wrapped in a sleeping bag and a tarp and

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sealed with duct tape. Chains were wrapped around the victim's legs and her body was identified from dental records.

Defendant was arrested on 30 May 2003. Mark Edwards, Esq. ("Attorney Edwards") was appointed to represent defendant. Defendant was indicted for the victim's murder on 2 June 2003. On 20 September 2004, defendant was also indicted as attaining habitual felon status based upon three prior felony convictions in the State of Illinois. On 14 June 2005, defendant moved to dismiss Attorney Edwards and for the appointment of new counsel. The trial court allowed defendant to proceed *pro se* and ordered Attorney Edwards to remain available as standby counsel.

On 11 October 2005, defendant waived his right to all assistance of counsel and stated he desired to represent himself and appear on his own behalf for trial. Defendant's non-capital trial began on 31 October 2005. On 29 November 2005, a jury returned a verdict finding defendant to be guilty of first-degree murder. The trial court sentenced defendant to life imprisonment without parole. Defendant appeals.

II. Issues

Defendant argues the trial court erred by: (1) allowing him to represent himself; (2) admitting evidence concerning certain behaviors of a cadaver dog; (3) admitting statements concerning his attacks on the victim and his and the victim's financial problems; and (4) admitting his prior crimes, wrongs, or acts into evidence. Defendant also argues that a breakdown occurred in the adversarial process and he is entitled to a new trial.

III. Waiver of Counsel

[1] Defendant argues the trial court erred by allowing him to represent himself *pro se* at his trial and contends the trial court should have presented him with three options: (1) proceed with appointed counsel; (2) represent himself *pro se*; or (3) continue with appointed counsel, who was to defer to defendant's wishes when he and counsel conflicted on trial strategy. We disagree.

A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:

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- (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
- (2) Understands and appreciates the consequences of this decision; and
- (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242 (2005). This statutory inquiry is required in every case where a defendant elects to represent himself without the assistance of counsel. *State v. White*, 78 N.C. App. 741, 746, 338 S.E.2d 614, 617 (1986).

In *State v. Hoover*, this Court held the trial court did not err in allowing the defendant to waive his right to counsel and permitting defendant to represent himself where the record showed the trial court fully complied with the requirements and stipulations of N.C. Gen. Stat. § 15A-1242 before defendant was allowed to waive his right to counsel. 174 N.C. App. 596, 600, 621 S.E.2d 303, 306 (2005), *cert. denied*, 360 N.C. 488, 632 S.E.2d 766, *appeal dismissed*, 360 N.C. 540, 634 S.E.2d 543 (2006).

Defendant filed a written motion to dismiss Attorney Edwards as his appointed counsel and stated his relationship with Edwards had “degenerate[d] past repair to a degree prejudicial to the conduct of the case for the defense.” At the hearing on the motion, defendant stated, “I would prefer to attempt to represent myself *pro se* at this point, Your Honor. I understand the caution and that’s the route I choose to go.” The trial judge expressed hesitation, but allowed defendant to proceed *pro se* and ordered Attorney Edwards to remain as standby counsel. Defendant signed a waiver of right to counsel.

The trial court stated after defendant signed the waiver that it found defendant understood the nature of the charges, proceedings, and range of permissible punishments. Defendant reminded the trial judge to be sure that the trial court was satisfied that he had such understanding. The trial court again reviewed the charges and possible punishments with defendant.

On 11 October 2005, the trial court again apprised defendant of his rights to court-appointed counsel, self-representation, or hired counsel. The trial court detailed each sentence and punishment de-

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fendant could receive and received assurances from him that he understood all possible scenarios. Defendant signed another waiver of his right to counsel.

On two separate occasions prior to defendant's jury trial beginning on 31 October 2005, defendant waived his right to counsel. The trial court in both instances engaged in and applied the appropriate statutory inquiry and safeguards to defendant's election to proceed *pro se*. *Id.* This assignment of error is overruled.

IV. Cadaver Dog Evidence

[2] Defendant argues the trial court erred by allowing a cadaver dog handler to testify concerning the significance of various behaviors displayed by the dog. We dismiss this assignment of error.

A. Standard of Review

If alleged error is properly preserved at trial, we review evidentiary rulings for an abuse of discretion. *State v. Boston*, 165 N.C. App. 214, 218, 598 S.E.2d 163, 166 (2004). "A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985) (citing *White v. White*, 312 N.C. 770, 324 S.E.2d 829 (1985)).

In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C.R. App. P. 10(c)(4) (2007). Plain error review applies only to challenges of jury instructions and to evidentiary matters. *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39-40 (2002), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003); *State v. Cummings*, 352 N.C. 600, 613, 536 S.E.2d 36, 47 (2000), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641 (2001). Under plain error analysis, "the appellate court must be convinced that absent the error the jury probably would have reached a different verdict." *State v. Hartman*, 90 N.C. App. 379, 383, 368 S.E.2d 396, 399 (1988) (citing *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986)).

B. Analysis

Defendant objected to the introduction of evidence from the cadaver dog by pretrial motion, but failed to preserve the issue by

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renewing his objection when the evidence was presented at trial. Defendant, in his brief and at oral argument, failed to “specifically and distinctly contend[]” the admission of this evidence “amount[ed] to plain error.” N.C.R. App. P. 10(c)(4). This assignment of error is dismissed due to defendant’s failure to properly preserve and present it or to request and argue for plain error review. *State v. Washington*, 134 N.C. App. 479, 485, 518 S.E.2d 14, 17 (1999).

V. Hearsay

[3] Defendant argues the trial court erred in allowing witnesses to testify to statements the victim allegedly made to them. We disagree.

“ ‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” N.C. Gen. Stat. § 8C-1, Rule 801(c) (2005). “Hearsay is not admissible except as provided by statute or by these rules.” N.C. Gen. Stat. § 8C-1, Rule 802 (2005).

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

- (1) Present Sense Impression.—A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

. . . .

- (3) Then Existing Mental, Emotional, or Physical Condition.—A statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition

N.C. Gen. Stat. § 8C-1, Rule 803 (2005).

A. Testimony of Margaret Lewis

Defendant failed to object to the testimony of Margaret Lewis (“Lewis”) at trial. Defendant argues the admission of her testimony constitutes plain error.

Lewis testified the victim called her at work “crying” and “very upset” and stated that something “very alarming” and “scary” had “just happened.” After describing the victim’s initial mental state, Lewis testified that the victim explained to her and defendant’s financial situation and stated defendant choked her after she had confronted him about their finances. The victim told Lewis the choking incident “really scared” her.

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Lewis's testimony consisted of "statement[s], other than one[s] made by the declarant while testifying at [] trial . . . offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c). Lewis's hearsay testimony is not excluded by the hearsay rule because the victim's statements were her "present sense impression" of the choking incident. N.C. Gen. Stat. § 8C-1, Rule 803(1) (2005). "There is no rigid rule about how long is too long to be 'immediately thereafter.'" *State v. Clark*, 128 N.C. App. 722, 725, 496 S.E.2d 604, 606 (1998).

B. Testimony of Donna Putler, Eleanor Hennessey, Cheri Booth,
and Ya-Mel Mandeville

[4] Defendant objected to the testimony of Donna Putler ("Putler"), Eleanor Hennessey ("Hennessey"), Cheri Booth ("Booth"), and Ya-Mel Mandeville ("Mandeville") at trial. We review the admission of each of these witnesses' testimony for an abuse of discretion.

Putler testified that she had a conversation with the victim concerning "polyamorous" relationships. Statements concerning the victim's belief that polyamorous relationships are "just an excuse [for sex]" are not hearsay. These statements were not offered to prove the truth of the matter asserted. The relevance of Putler's testimony tended to show defendant's motive and outweighs its danger of unfair prejudice. N.C. Gen. Stat. § 8C-1, Rule 403 (2005; N.C. Gen. Stat. § 8C-1, Rule 404(b) (2005).

Putler also stated the victim had told her she was "deeply concerned" about defendant's and her financial situation. Hennessey testified the victim was "very distraught" after confronting defendant about their financial situation. Hennessey testified the victim called her at work and stated she was afraid that she was going to lose her house and car. The victim told Hennessey she felt "very foolish" about the situation. Booth testified that the victim was "very concerned" about not having enough money to buy groceries.

Hennessey and Mandeville both testified the victim expressed her fears to them toward defendant after incidents of domestic violence had occurred. Hennessey stated the victim was "scared" and "confused" after an incident in which defendant tackled her and tried to crush her with his body. Mandeville testified the victim related an incident where defendant had used a taser on her. Two days after this incident, the victim remained "shocked," "frightened," and "embarrassed" by what defendant had done to her.

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“Evidence tending to show the state of mind of the victim is admissible as long as the declarant’s state of mind is relevant to the case.” *State v. Meekins*, 326 N.C. 689, 695, 392 S.E.2d 346, 349 (1990) (citing *State v. Cummings*, 326 N.C. 298, 389 S.E.2d 66 (1990)). Here, evidence of the victim’s state of mind is relevant and bears directly on the victim’s relationship with defendant before she was killed and his motive, intent, plan, or absence of mistake or accident in the victim’s death. N.C. Gen. Stat. § 8C-1, Rule 404(b); see *State v. Westbrooks*, 345 N.C. 43, 59, 478 S.E.2d 483, 492 (1996) (The trial court properly admitted statements the victim made about his financial and marital problems, as they indicated the victim’s “mental condition at the time they were made and were not merely a recitation of facts.”)

The trial court neither erred nor abused its discretion by allowing the witnesses to testify to the victim’s statements concerning her and defendant’s financial situation and defendant’s alleged acts of domestic violence against the victim. N.C. Gen. Stat. § 8C-1, Rule 404(b). This assignment of error is overruled.

VI. Admission of Defendant’s Prior Crimes, Wrongs, or Acts

[5] Defendant argues that the trial court abused its discretion when it overruled his objections to testimony of his prior acts of dishonesty and bad character. Defendant also argues the trial court committed plain error in failing to strike such testimony *ex mero motu*. We disagree.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2005) states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

Here, the State introduced evidence of defendant’s financial dealings with other people, depletion of the victim’s bank accounts, violent acts toward the victim, and his adulterous relationships. This evidence tended to show defendant’s motive, intent, preparation, plan, absence of mistake, and knowledge. N.C. Gen. Stat. § 8C-1, Rule 404(b). The relevancy of this evidence outweighs its danger of unfair prejudice. N.C. Gen. Stat. § 8C-1, Rule 403. The trial court properly admitted this evidence. This assignment of error is overruled.

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VII. Breakdown of Adversarial Process

[6] Defendant argues that several rulings made by the trial court “sabotaged the adversarial process to the extent that the result of the trial is presumptively unreliable.” We disagree.

A. Standard of Review

Matters relating to the actual conduct of a criminal trial are left largely to the sound discretion of the trial judge so long as defendant's rights are scrupulously afforded him. . . . [S]uch discretion is not unlimited and, when abused, is subject to review. To establish that a trial court's exercise of discretion is reversible error, a defendant must show harmful prejudice as well as clear abuse of discretion. A trial court's actions constitute abuse of discretion upon a showing that [the] actions are manifestly unsupported by reason and so arbitrary that [they] could not have been the result of a reasoned decision.

State v. Williams, 361 N.C. 78, 80-81, 637 S.E.2d 523, 525 (2006) (internal quotations and citations omitted).

B. Analysis

Defendant argues the trial court erred by: (1) denying his motion to be held in the county jail during trial; (2) denying his motions for sanctions against the State for failing to timely provide discovery; (3) denying his motion for prior notice of the order in which the State intended to present its witnesses; (4) requiring him to provide the State with information on the searches he intended to perform on certain computers; and (5) ruling that evidence favorable to him was not necessarily “exculpatory.”

In the body of his argument, defendant cites *United States v. Cronin*, 466 U.S. 648, 80 L. Ed. 2d 657 (1984), and *State v. Colbert*, 311 N.C. 283, 316 S.E.2d 79 (1984), for the proposition that the trial court's rulings “sabotaged the adversarial process to the extent that the result of the trial is presumptively unreliable.” Both cases cited by defendant deal with claims of ineffective assistance of counsel.

“[A] defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of ‘effective assistance of counsel.’ ” *Faretta v. California*, 422 U.S. 806, 835, n. 46, 45 L. Ed. 2d 562, 581 (1975). Defendant has failed to “show harmful prejudice [to himself] as well as clear abuse of discretion[.]”

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by the trial court. *Williams*, 361 N.C. at 81, 637 S.E.2d at 525. This assignment of error is overruled.

VIII. Conclusion

The trial court did not err in allowing defendant to proceed *pro se* with Attorney Edwards as standby counsel after it fully complied with N.C. Gen. Stat. § 15A-1242. Defendant failed to properly preserve and argue the admission of the cadaver dog handler's testimony concerning the dog's behaviors and failed to assert plain error. The trial court neither erred nor abused its discretion by allowing the witnesses to testify about statements the victim had made to them.

Evidence of defendant's prior acts or wrongs was properly admitted to show proof of motive, intent, preparation, plan, absence of mistake, and knowledge by defendant. N.C. Gen. Stat. § 8C-1, Rule 404(b). Defendant failed to show several rulings by the trial court resulted in "harmful prejudice as well as clear abuse of discretion." *Williams*, 361 N.C. at 81, 637 S.E.2d at 525. Defendant received a fair trial, free from the prejudicial errors he preserved, assigned, and argued. Defendant failed to show that, but for any plain errors, "the jury probably would have reached a different verdict." *Hartman*, 90 N.C. App. at 383, 368 S.E.2d at 399. We find no error in the verdict or the judgment entered thereon.

No Error.

Judges McGEE and ELMORE concur.

LAKE GASTON ESTATES PROPERTY OWNERS ASSOCIATION, INC.; GEORGE S. WELLS, AND WIFE, GAIL L. WELLS; AND HILBERT A. CARTER, AND WIFE, MARY P. CARTER, PETITIONERS v. THE COUNTY OF WARREN, A BODY POLITIC AND CORPORATE; AND FRESHWATER PEARL, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, RESPONDENTS

No. COA07-140

(Filed 6 November 2007)

1. Deeds— restrictive covenants—void for vagueness

In an action arising from a proposal to build condominiums in an area that had been used for a boat ramp and lake access, the court's findings supported the conclusion that restrictive

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covenants were void for vagueness and that the area was not subject to those restrictive covenants.

2. Deeds— restrictive covenants—void for vagueness—insufficient material to extrapolate meaning

In an action arising from a proposal to build condominiums in an area that had been used for a boat ramp and lake access, the trial court did not err by finding a provision in a restrictive covenant void for vagueness where the court had only the two words “Reserved Commercial” from which to extrapolate meaning.

3. Deeds— restrictive covenants—noxious and offensive uses—sewage treatment system

The trial court did not err by denying injunctive relief where respondent’s development plan included a sewage treatment system and restrictive covenants prohibit noxious and offensive uses. While there is some common sense support for petitioner’s contention, there is no evidence supporting a finding that the proposed sewage treatment drip system would be a noxious or offensive use.

4. Easements— relocation—no limiting language

The trial judge did not err by concluding that an easement with a boat ramp and lake access could be relocated from a reserved area to a new parcel. The language of the easement contains no restriction as to where the new right of way might be constructed.

Appeal by petitioners from judgment entered 23 July 2006 by Judge Donald W. Stephens in Warren County Superior Court. Heard in the Court of Appeals 12 September 2007.

Currin & Dutra, LLP, by Lori A. Dutra, for plaintiff-appellants.

William T. Skinner, IV, for respondent-appellee.

ELMORE, Judge.

Lake Gaston Estates subdivision (Lake Gaston Estates) is located on Lake Gaston in Warren County. When Lake Gaston Estates was created, the developers executed and recorded certain restrictive covenants and recorded a subdivision plat. The properties at issue here are comprised of lots B-33, B-34, B-35, B-36, and an area designated on the original plat as “Reserved” (the reserved area). The prop-

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erties are located at the intersection of Thorough Fare (S.R. 1418) and Recreation Lane (S.R. 1414). Recreation Lane runs North-South along the shore of Lake Gaston. The properties in question are located on the strip of land between Recreation Lane and the beach. Thorough Fare runs East-West and intersects with Recreation Lane. It narrows to an asphalt and gravel road between Recreation Lane and the water. The land at the terminus of this asphalt and gravel road is the reserved area. Lots B-35 and B-36 lie to the south and north of Thorough Fare, respectively, and between Recreation Lane and the reserved area. Lots B-33 and B-34 lie to the south of of Lot B-35, but are divided from the reserved area by a strip of land owned by the Lake Gaston Estates Property Owners Association, Inc. (the Association) and used as a park (the park).

At the time the subdivision plat was recorded, lots B-33, B-34, B-35, and B-36 were designated "Reserved Commercial." Four other lots not at issue here were also designated "Reserved Commercial." With the exception of the reserved area and the park, all other "enumerated lots in the greater Lake Gaston Estates subdivision were expressly designated and restricted to single-family residential use only." However, when the County of Warren (the County) enacted a revised zoning ordinance in 1984 and 1985, lot B-35, lot B-36, and the reserved area were zoned as "Lakeside Business."

In 1988, the subdivision's developer granted a non-exclusive easement over the reserved area for the purpose of boat launching and lake access for Lake Gaston Estates residents and their guests (the easement). The Association built a concrete dock where the end of that easement meets the lakeshore. A gravel drive was also built along the easement, which residents use when they pull their boats down to the dock.

In 1996, the developer conveyed lot B-35, lot B-36, a portion of the park, and the reserved area as a composite to Ray W. Odom. The deed stated that these properties were subject to the restrictive covenants. Freshwater Pearl, LLC (respondent)¹ purchased these properties by deed dated 26 August 2002. Respondent also purchased lots B-33 and B-34 on that date.

Respondent then submitted an application for rezoning to the Warren County Board of Commissioners (the Board), with an accompanying development plan for construction of forty-eight multi-family

1. The County is also a respondent in this case, but our use of "respondent" in this opinion refers only to Freshwater Pearl, LLC.

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or condominium units, parking areas, and a small package treatment sewer plant. Respondents planned to erect buildings across the easement and proposed moving the easement to another location. Respondent petitioned the Board to rezone 4.78 acres comprised of lots B-35 and B-36 and the reserved area from “Lakeside Business” to “Lakeside Residential.” The Board granted the petition on 1 December 2003.

In response, the Association and several Lake Gaston Estates landowners (collectively, petitioners) filed a petition for declaratory judgment and injunctive relief on 16 February 2004. Petitioners sought, among other things, determinations regarding the validity of the zoning amendment and whether respondents could relocate the easement.

In a 21 July 2006 order, the superior court held that petitioners are entitled to use the easement “in accordance with the terms and provisions [in the Warren County Public Registry] and as further clarified” by conclusion of law No. 8. The court denied petitioners any other relief. This appeal followed.

[1] Petitioners first argue that the trial court erred in its conclusion of law No. 4 that the restrictive covenants governing Lake Gaston Estates are “void for vagueness and unenforceable as a matter of law relative to the properties of [respondent] and as applied to said properties of said Respondent, except as such common or universal portions thereof which could be applied to properties which are used for either commercial or residential purposes.” Petitioners contend that, to the contrary, the covenants contain specific language restricting all lots not otherwise designated to single family residential use.

Petitioners also argue that, contrary to conclusion of law No. 7, the reserved area was expressly made subject to the covenants restricting all lots to single family residential uses when it was surveyed as a lot and sold by the developer in 1996. Conclusion of law No. 7 states, in relevant part:

There has been no showing, either by expression or clear and undisputed implication, that the developers of the Lake Gaston Estates subdivision intended that the “Reserved” area . . . and [lots B-35 and B-36] . . . [were] to be conveyed as a single lot which was to be restricted to single-family residential use.

We cannot agree with either strand of petitioners’ argument.

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When a judgment has been rendered in a non-jury trial, our standard of review is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment. Findings of fact are binding on appeal if there is competent evidence to support them, even if there is evidence to the contrary.

Town of Green Level v. Alamance Cty., 184 N.C. App. 665, 668-69, 646 S.E.2d 851, 854 (2007) (citations and quotations omitted).

Petitioners assigned error only to finding of fact No. 24, and because they "failed to assign error to any of the trial court's [other] findings of fact, they are binding on appeal." *Langdon v. Langdon*, 183 N.C. App. 471, 475, 644 S.E.2d 600, 603 (2007) (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)). Conclusions of law Nos. 4 and 7 are supported by the following unchallenged findings of fact:

16. There are no restrictions in the foregoing covenants which forbid or prevent [respondent] from converting the use of its foregoing properties to residential use.

17. There are no provisions in the foregoing covenants which provide that if Respondent converted the use of its foregoing properties to residential use, then the same would become subject to the existing residential use limitations which are found in the covenants.

18. There are no provisions in the foregoing covenants which address and regulate or otherwise restrict any future development of the "Reserved" areas shown, designated and described on the [subdivision plat].

19. There are no provisions in the foregoing covenants which address and regulate or otherwise restrict any future development of the "Reserved Commercial" lots which are shown, designated and described on the [subdivision plat].

20. There are no provisions in the foregoing covenants which either define or describe the term "lot" as said term is found in Paragraph 1 (One) of Article III of said covenants.

21. There are no provisions or information in or on the [subdivision plat] which either define or describe any definition or application of the terms "Reserved" and "Reserved Commercial" as the same appear on the foregoing recorded survey and plat and as

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further applied to the foregoing properties of Respondent Freshwater Pearl, LLC.

22. The developers did not delineate, enumerate, designate or otherwise define the “Reserved” area as a lot in the 1996 deed to Ray W. Odom

23. The developers did not delineate, enumerate, designate or define the “Reserved” area as a lot restricted for single-family residential use only in the foregoing 1996 deed to Ray W. Odom

Accordingly, we hold that the trial court’s conclusions (1) that the restrictive covenants were void for vagueness as they relate to respondent’s properties, and (2) that the reserved area is not subject to the restrictive covenants, are both supported by the findings of fact.

[2] Petitioners next argue that the trial court erred by ruling that the designation of “Reserved Commercial” on lots B-33 through B-36 on the plat was void for vagueness because the subdivision plat clearly restricted those lots to “Reserved Commercial” and respondent’s deed contained the express reservation. Again, our task is to determine whether the trial court’s conclusions of law are supported by the findings of fact, and whether the findings of fact are supported by competent evidence.

The deed conveying the lots in question to respondent states that the conveyance is subject to:

3. That declaration as the same appears in said Registry in Book 227, Page 670.

4. The designation of Lots B-35 and B-36 on said plat recorded in Plat book 9, Page 70 as “Reserved Commercial.”

The declaration states that “[t]he following restrictions and covenants shall apply to the property known as Lake Gaston Estates as designated on the plat These restrictions and covenants are to run with the land and shall be binding on all parties and persons claiming under them” The first restriction states that “[a]ll lots in the tract, except those otherwise designated on the recorded plat, shall be used for residential purposes only. No building shall be erected . . . on any lot other than one detached single family dwelling not to exceed two stories in height, exclusive of basement.”

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As stated above, the trial judge found as fact that the restrictive covenants contained no provisions that “address and regulate or otherwise restrict any future development of the ‘Reserved Commercial’ lots” He also found as fact that the recorded survey and plat contain no provisions or information that “define or describe any definition or application of the terms ‘Reserved’ and ‘Reserved Commercial’” Petitioners did not assign error to these findings and thus they are verities on appeal. *Langdon*, 183 N.C. App. at 475, 644 S.E.2d at 603.

Petitioners argue that the declaration and the plat’s designation of the lots as “Reserved Commercial” without further definition do not support a conclusion that the designation is void for vagueness because the term can be “understood by common sense and common usage.” Petitioners offer several cases in support of this contention, but none answer the question at hand: Is the designation of certain lots as “Reserved Commercial,” without further explanation, too vague to be enforceable?

There is little case law addressing the question of what language in a restrictive covenant is void for vagueness, and what language is not. The only case in which we specifically addressed this question is *Latham v. Taylor*, 10 N.C. App. 268, 178 S.E.2d 122 (1970). We concluded that a restrictive covenant which provided that a piece of property

shall not be used for any manufacturing, industrial or apartment house purposes, its use being restricted to residential and/or recreational and educational purposes for children and adults to be carried on in connection with and as a part of a camp for children or adults operated as a business enterprise

was not void for vagueness. *Id.* at 269-70, 178 S.E.2d at 123-24. *Latham* is of limited use here because the language of its restrictive covenant is so much more specific than the language in the restrictive covenant at hand, which consists only of the words “Reserved Commercial.”

It appears that we have not dealt with this “void for vagueness” question because our courts usually supply a definition for an undefined term in a covenant rather than void the entire covenant. For example, this Court recently supplied a definition for the word “extension”: “The Declaration does not define the term ‘extension’; rather [s]ound judicial construction” of the covenant requires the

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Court to give effect to this clause ‘according to the natural meaning of the words.’” *Terres Bend Homeowners Ass’n v. Overcash*, 185, N.C. App. 45, 54, 647 S.E.2d 465, — (2007) (quoting *Hobby & Son v. Family Homes*, 302 N.C. 64, 71, 274 S.E.2d 174, 179 (1981)).

In *Hobby*, our Supreme court set forth the following principles governing enforcement of restrictive covenants:

We begin our analysis of this case with a fundamental premise of the law of real property. While the intentions of the parties to restrictive covenants ordinarily control the construction of the covenants, such covenants are not favored by the law, and they will be strictly construed to the end that *all ambiguities will be resolved in favor of the unrestrained use of land*. The rule of strict construction is grounded in sound considerations of public policy: It is in the best interests of society that the free and unrestricted use and enjoyment of land be encouraged to its fullest extent. Even so, we pause to recognize that *clearly and narrowly drawn restrictive covenants* may be employed in such a way that the legitimate objectives of a development scheme may be achieved.

Hobby, 302 N.C. at 70-71, 274 S.E.2d at 179 (emphases added) (internal citations omitted). In this case, the restriction is not “clearly and narrowly drawn” and both the meaning and application of the words “Reserved Commercial” are ambiguous. It is therefore necessary to resolve the ambiguity “in favor of the unrestrained use of land.” *Id.* Although courts may supply meaning to ambiguous terms, here the trial court had only two words from which to extrapolate meaning. Given this paucity of original material, the trial court did not err by finding the provision void for vagueness.

[3] Petitioners next argue that the trial judge erred by denying injunctive relief when respondent’s development plan includes a sewage treatment system and the restrictive covenants prohibit noxious and offensive uses. Specifically, the restrictive covenants state, “No noxious or offensive activity shall be carried on upon any lot nor shall anything be done thereon which may become an annoyance or nuisance to the neighborhood.” Petitioners assert that “[t]he use of the entirety of lots 33 and 34, and arguably lot 35 for sewage treatment use is patently a noxious or offensive use.”

The trial judge did not specifically address the issue of the proposed sewage plant in his order, but his general denial of injunctive

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relief encompasses petitioners' request for a declaration on the inclusion of the sewage treatment system. Although there is some common sense support for petitioners' contention that the proposed sewage plant is a "patently" noxious or offensive activity, petitioners offer no other support for their conclusion. Trial testimony clarifies that the sewage treatment system is a "drip system with ponds" and not a "plant." William Sparkman, a member-manager of Freshwater Pearl, LLC, testified that respondent had hired an engineer to determine the best way to address the proposed development's waste water. The engineer proposed a "drip system which was pre-treated that would filter into specifically located ponds to maintain [the waste] on the area." During the 5 August 2003 Board minutes, Sparkman stated that pollution studies would be addressed during the septic permitting phase.

There is no evidence supporting a finding that the proposed drip system would be a noxious or offensive use of the land. Indeed, the other Lake Gaston Estates homeowners have septic systems because the development is not connected to the county water and sewer lines. A septic system may give rise to unpleasant odors and unwellcome overflow of its own.

It appears that these issues may be raised and addressed during the septic permitting phase. It would be premature to grant an injunction preventing respondents from going forward with their sewage treatment system at this time.

[4] In their final argument, petitioners aver that the trial judge erred by concluding that the easement could be relocated from the reserved area to a new parcel of land. The easement reads, in relevant part, as follows:

This easement shall be a perpetual, non-exclusive right of way 60 feet in width and shall be used by the homeowners and their guests for the purposes of boat launching and access to the waters of Lake Gaston. The easeemnt [sic] shall be situated at a place and location on said reserved area at the discretion of the parties of the first part, their successors and assigns.

Subject however to the following:

The party of the first part, it successors or assigns, reserve the right to relocate and to discontinue the use of a certain access roadway and boat ramp situated on the above described property. However, upon the discontinuance of these said improvements it

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is agreed that the party of the first part, its successors or assigns, shall simultaneously with the relocation or discontinuance of existing improvements cause to be constructed an access roadway and boat ramp at no expense to the parties of the second part.

Respondents planned to move the easement so that it crosses a different parcel of land and to construct a new access roadway and boat ramp at its own expense. The trial judge, in finding of fact No. 24, stated that

the developers, for themselves and their successors or assigns, reserved the right to relocate and to discontinue the use of a certain access roadway and boat ramp situated on the foregoing property. The foregoing easement further provided that should the foregoing easement and boat ramp access be relocated or discontinued, then the developers covenanted and agreed that a new access roadway and boat ramp would be constructed at no expense to Petitioners.

The judge, in conclusion of law No. 8, then stated that

Respondent Freshwater Pearl, LLC is entitled, in its sole discretion, to relocate or discontinue said easement relative to the property described in the foregoing easement in accordance with the terms and provisions thereof; PROVIDED, HOWEVER, that should said Respondent either relocate or discontinue said easement, then said Respondent shall construct, or cause to be constructed, an access roadway and boat ramp either in a different location on the foregoing property subject to the foregoing easement, or construct, or cause to be constructed, an access roadway and boat ramp *on a separate tract or parcel of property* which can be used therefor at no cost to Petitioners.

(Emphasis added).

Petitioners argue that “[t]he easement provides that the grantors desired to convey to the Association ‘the right to use a *certain reserved area* for access to the waters of Lake Gaston,’ ” and that the easement “shall ‘be situated at a place and location on said *reserved area*’ at the discretion of the grantors.” We agree with petitioners’ initial reasoning about the easement, but cannot follow that reasoning to petitioners’ ultimate conclusion.

The easement clearly states that the right-of-way must initially be located within the bounds of the reserved area. However, its qualify-

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ing language does not state that if the right-of-way is relocated it must be relocated within the bounds of the reserved area. It states instead that the developer or its successor, respondent, may relocate and discontinue the use of the “access roadway and boat ramp situated on the above described property.” Upon such relocation or discontinuance, respondent must “cause to be constructed an access roadway and boat ramp at no expense to” the Association. The language of the easement contains no restriction as to where the new right-of-way must be constructed if the old one is relocated, and we decline to read such a restriction into the document.

Accordingly, we affirm the judgment of the trial court.

Affirmed.

Judges McGEE and STEELMAN concur.

ALAN CAPPS, PLAINTIFF v. NW SIGN INDUSTRIES OF NORTH CAROLINA, INC., A
NORTH CAROLINA CORPORATION, RONALD BRODIE AND CHRIS REEDEL,
DEFENDANTS

No. COA07-99

(Filed 6 November 2007)

1. Appeal and Error— brief—assignments of error—record references not included

Defendants’ appeal was subject to dismissal where they failed to comply with Appellate Rule 10(c)(1) by not including clear and specific record references in their assignments of error.

2. Appeal and Error— brief—questions presented—pertinent assignments of error required

Defendants’ appeal was subject to dismissal where, following each of the questions presented, they cited all thirty-four of their assignments of error. Appellate Rule 28(b)(6) requires a reference to assignments of error pertinent to the question.

3. Appeal and Error— violations of requirements for brief— Rule 2 not invoked

Appellate Rule 2 was not invoked where violations of the Appellate Rules were egregious. Nothing suggests excep-

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tional circumstances for suspending or varying the rules in order to prevent manifest injustice or to expedite decision in the public interest.

Judge McGEE dissenting.

Appeal by defendants from order entered 20 October 2006 by Judge J. Gentry Caudill in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 October 2007.

James, McElroy & Diehl, P.A., by Richard B. Fennell and Jared E. Gardner, for plaintiff-appellee.

Vandeventer Black LLP, by David P. Ferrell and Norman W. Shearin, Jr., for defendants-appellants.

TYSON, Judge.

NW Sign Industries of North Carolina, Inc., a North Carolina Corporation, (“NW Sign of N.C.”), Ronald Brodie, and Chris Reedel (collectively, “defendants”) appeal from an order entered denying their motion to dismiss. We dismiss defendants’ appeal.

I. Background

Ronald Brodie is the President and CEO of NW Sign Industries, Inc., a New Jersey Corporation (“NW Sign of N.J.”) and Chris Reedel is the Vice President of NW Sign of N.J. and the General Manager of NW Sign of N.C. This dispute arose out of an employment contract between Alan Capps (“plaintiff”) and NW Sign of N.J. Plaintiff was employed as a salesperson by NW Sign of N.J. from December 2000 until November 2002. Plaintiff began working in the State of New Jersey and in January 2001, worked for NW Sign of N.C., at which time he was added to the NW Sign of N.C. payroll. Plaintiff alleges NW Sign of N.C. terminated his employment in November 2002 in order to avoid paying him a draw against his 9.09 percent commission of his sales.

On 9 July 2003, plaintiff filed a complaint asserting violations of the North Carolina Wage and Hour Act, wrongful discharge, and breach of contract. Plaintiff amended his complaint on 15 October 2003 to include a claim for punitive damages. On 19 November 2003, defendants filed their answer, motion for judgment on the pleadings, motion to dismiss, and counterclaims.

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On 17 February 2004, the trial court entered an order denying defendants' motion for judgment on the pleadings and motion to dismiss. Defendants appealed. A divided panel of this Court dismissed defendants' appeal as interlocutory. *See Capps v. NW Sign Indus. of N.C., Inc.*, 171 N.C. App. 409, 614 S.E.2d 552 (2005), *vacated and remanded*, 360 N.C. 391, 627 S.E.2d 614 (2006). Defendants appealed. Our Supreme Court vacated and remanded this Court's order dismissing defendants' appeal with instructions for this Court to further remand to the trial court for "findings of fact sufficient for appellate review of the jurisdictional issue." *Capps*, 360 N.C. at 392, 627 S.E.2d at 614.

On remand, the trial court entered findings of fact and conclusions of law denying defendants' motion for judgment on the pleadings and motion to dismiss. Defendants appeal.

II. Issue

Defendants argue the trial court erred by failing to find plaintiff's original employment contract with NW Sign of N.J. is enforceable.

III. Motion to Dismiss for Appellate Rules Violations

On 21 June 2007, plaintiff moved to dismiss defendants' appeal for numerous appellate rules violations. Defendants failed to amend or correct the errors raised in plaintiff's motion to dismiss.

A. Appellate Rules Violations

"It is well settled that the Rules of Appellate Procedure are mandatory and not directory. Thus, compliance with the Rules is required." *State v. Hart*, 361 N.C. 309, 311, 644 S.E.2d 201, 202 (2007) (internal citations and quotations omitted).

Our Supreme Court's interpretation and application of the Appellate Rules is not new nor has it changed in the past 120 years. In 1889, in the case of *Walker v. Scott*, our Supreme Court stated:

The impression seems to prevail, to some extent, that the Rules of Practice prescribed by this Court are merely directory—that they may be ignored, disregarded and suspended almost as of course. This is a serious mistake. The Court has ample authority to make them. (The Const., Art. IV, sec. 12; The Code, sec. 961; *Rencher v. Anderson*, 93 N.C. 105 [(1885)]; *Barnes v. Easton*, 98 N.C. 116, 3 S.E. 744 [(1887)].) They are deemed essential to the protection of the rights of litigants and the due administration of

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justice. They have force, and the Court will certainly see that they have effect and are duly observed, whenever they properly apply.

102 N.C. 487, 490, 9 S.E. 488, 489 (1889).

Nearly eighty years ago, our Supreme Court also stated:

We have held in a number of cases that the rules of this Court, governing appeals, are mandatory and not directory. They may not be disregarded or set at naught (1) by act of the Legislature, (2) by order of the judge of the Superior Court, (3) by consent of litigants or counsel. *The Court has not only found it necessary to adopt them, but equally necessary to enforce them and to enforce them uniformly.*

Pruitt v. Wood, 199 N.C. 788, 789-90, 156 S.E. 126, 127 (1930) (emphasis supplied).

“‘[V]iolation of the mandatory rules will subject an appeal to dismissal.’” *Hart*, 361 N.C. at 311, 644 S.E.2d at 202 (quoting *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999)). “[W]hen [our Supreme] Court said an appeal is subject to dismissal for rules violations, it did not mean that an appeal shall be dismissed for any violation. Rather, subject to means that dismissal is one possible sanction.” *Id.* at 313, 644 S.E.2d at 203 (internal citations and quotations omitted). Some sanction, other than dismissal, may be appropriate, pursuant to Rule 25(b) or Rule 34 of the North Carolina Rules of Appellate Procedure. *Id.* at 311, 644 S.E.2d at 202.

“[T]he Rules of Appellate Procedure must be consistently applied; otherwise, the Rules become meaningless, and an appellee is left without notice of the basis upon which an appellate court might rule.” *Viar v. N.C. DOT*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (citing *Bradshaw v. Stansberry*, 164 N.C. 356, 79 S.E. 302 (1913)). “It is therefore necessary to have rules of procedure and to adhere to them, and if we relax them in favor of one, we might as well abolish them.” *Bradshaw*, 164 N.C. at 356, 79 S.E. at 302. In our discretion, we review to determine whether some lesser sanction is appropriate in this appeal.

1. Appellate Rule 10(c)(1)

[1] Plaintiff appropriately moved for and argues that defendants’ appeal should be dismissed and asserts defendants’ brief fails to comply with Rule 10(c)(1) of the North Carolina Rules of Appellate Procedure. We agree.

The record on appeal contains thirty-four assignments of error made by defendants. Each of these thirty-four assignments of error reference only to the first page of multi-page documents.

Rule 10(c)(1) of the North Carolina Rules of Appellate Procedure states that “[a]n assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, *with clear and specific record or transcript references.*” N.C.R. App. P. 10(c)(1) (2007) (Emphasis supplied).

Broad, vague, and unspecific assignments of error are insufficient to satisfy Rule 10. *See In re Appeal of Lane Co.*, 153 N.C. App. 119, 123, 571 S.E.2d 224, 226-27 (2002) (“Assignments of error [that are] . . . broad, vague, and unspecific . . . do not comply with the North Carolina Rules of Appellate Procedure[.]”) Defendants’ failure to include clear and specific record references in their assignments of error violates Rule 10(c)(1) of the North Carolina Rules of Appellate Procedure and subjects their appeal to dismissal.

2. Appellate Rule 28(b)(6)

[2] Plaintiff also argues defendants’ appeal should be dismissed and asserts defendants’ brief fails to comply with Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure. We agree.

In the argument section of defendants’ brief, defendants set forth five questions presented. Following each of defendants’ five questions presented, defendants cite all thirty-four of their assignments of error.

Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure states that “[i]mmediately following each question shall be a reference to the assignments of error *pertinent to the question*, identified by their numbers and by the pages at which they appear in the printed record on appeal.” N.C.R. App. P. 28(b)(6) (2007) (Emphasis supplied).

“This Court has noted that when the appellant’s brief does not comply with the rules by properly setting forth exceptions and assignments of error with reference to the transcript and authorities relied on under each assignment, it is difficult if not impossible to properly determine the appeal.” *Steingress*, 350 N.C. at 66, 511 S.E.2d at 299 (citing *State v. Newton*, 207 N.C. 323, 329, 177 S.E. 184, 187 (1934)). Defendants’ failure to reference the assignments of error pertinent to their appeal violates Rule 28(b)(6) of the North Carolina Rules of

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Appellate Procedure and subjects their appeal to dismissal. In our discretion, defendants' Appellate Rules violations are sufficiently egregious to warrant dismissal.

B. Discretionary Invocation of Appellate Rule 2

[3] In light of our Supreme Court's decision in *State v. Hart*, we must determine, in our discretion, whether to invoke and apply Rule 2, despite defendants' appellate rules violations, and review the merits of its appeal. 361 N.C. 309, 644 S.E.2d 201; see *State v. Patterson*, 185 N.C. App. 67, 648 S.E.2d 250 (2007); *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 183 N.C. App. 389, 645 S.E.2d 212 (2007). Under these facts, and in our discretion, we decline to do so.

Rule 2 of the North Carolina Rules of Appellate procedure states:

To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly prohibited by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

N.C.R. App. P. 2 (2007).

Our Supreme Court has stated, Appellate Rule 2 "must be applied cautiously." *Hart*, 361 N.C. at 315, 644 S.E.2d at 205. "Rule 2 relates to the residual power of [the] appellate courts to consider, *in exceptional circumstances*, significant issues of importance in the public interest or to prevent injustice which appears manifest to the court and *only in such instances*." *Id.* at 315-16, 644 S.E.2d at 205 (emphasis supplied) (citations omitted). The decision whether to invoke Appellate Rule 2 is discretionary and is to be limited to "rare" cases in which a fundamental purpose of the appellate rules is at stake. *Id.*

Rule 2 has most consistently been invoked to prevent manifest injustice in criminal cases in which substantial rights of a defendant are affected. *Id.* at 316, 644 S.E.2d at 205 (citing *State v. Sanders*, 312 N.C. 318, 320, 321 S.E.2d 836, 837 (1984)). Nothing in the record or briefs demonstrates "exceptional circumstances" to suspend or vary the rules in order "to prevent manifest injustice to a party, or to expedite decision in the public interest." *Id.* (citation omitted). The dissenting opinion agrees that defendant violated the appellate rules but does not analyze why this appeal presents "exceptional circum-

stances,” “significant issues of importance in the public interest,” or “affects substantial rights of [the] appellant.” *Id.* In the exercise of our discretion, we decline to ignore defendants’ uncorrected rules violations, and to invoke Appellate Rule 2.

III. Conclusion

Defendants’ brief violated the North Carolina Rules of Appellate Procedure. Plaintiff has moved to dismiss defendants’ appeal based on these violations. After service of plaintiff’s motion, defendants have neither moved to amend the record to correct their assignments of error nor to amend or substitute their brief to correctly identify which assignments of error are pertinent to their questions presented.

“ ‘The North Carolina Rules of Appellate Procedure are mandatory and failure to follow these rules will subject an appeal to dismissal.’ ” *Viar*, 359 N.C. at 401, 610 S.E.2d at 360 (quoting *Steingress*, 350 N.C. at 65, 511 S.E.2d at 299). “[T]he Rules of Appellate Procedure must be consistently applied; otherwise, the Rules become meaningless, and an appellee is left without notice of the basis upon which an appellate court might rule.” *Id.* at 402, 610 S.E.2d at 361 (citing *Bradshaw*, 164 N.C. at 356, 79 S.E. at 302). In the exercise of our discretionary authority, we hold defendants’ Appellate Rules violations do not warrant lesser sanctions and we decline to invoke Appellate Rule 2. *Hart*, 361 N.C. at 315, 644 S.E.2d at 204-05. Defendants’ appeal is dismissed.

Dismissed.

Judge ELMORE concurs.

Judge McGEE dissents by separate opinion.

McGEE, Judge, dissenting.

I do not believe this case should be dismissed and I therefore respectfully dissent from the majority opinion. I believe this case should be heard on its merits and I would impose on Defendants the printing costs of the appeal.

The majority correctly recognizes that our Supreme Court, in *State v. Hart*, 361 N.C. 309, 644 S.E.2d 201 (2007), recently clarified its precedent related to violations of the Rules of Appellate Procedure: “[W]hen this Court said an appeal is ‘subject to’ dis-

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missal for rules violations, it did not mean that an appeal *shall be* dismissed for any violation. Rather, ‘subject to’ means that dismissal is one possible sanction.” *Id.* at 313, 644 S.E.2d at 203 (citation omitted). The majority also correctly recognizes that in *Hart*, our Supreme Court stated that some sanction, other than dismissal, may be appropriate for rules violations. *Id.* at 311, 644 S.E.2d at 202. However, I believe the majority incorrectly concludes that dismissal is the appropriate sanction for Defendants’ violations of the Rules of Appellate Procedure.

In *Peverall v. County of Alamance*, 184 N.C. App. 88, 645 S.E.2d 416 (2007), and *McKinley Bldg. Corp. v. Alvis*, 183 N.C. App. 500, 645 S.E.2d 219 (2007), both decided after *Hart*, our Court declined to dismiss the cases based upon multiple violations of the Rules of Appellate Procedure. In *Peverall*, the appellant violated Rule 28(b)(6) by failing to provide the applicable standards of review and by failing to cite authority supporting the appropriate standards of review. *Peverall*, 184 N.C. App. at 91, 645 S.E.2d at 418. The appellant in *Peverall* also violated Rule 28(b)(6) and Rule 10(c)(1) because the appellant’s assignments of error in the record and brief incorrectly referenced the record. *Id.* at 91-2, 645 S.E.2d at 418-19.

In *McKinley*, the appellants violated Rule 28(b)(4) by failing to cite a statute permitting appellate review. *McKinley*, 183 N.C. App. at 503-04, 645 S.E.2d at 221. The appellants violated Rule 28(b)(6) by failing to define their proposed standard of review and by failing to cite legal authority in support of that standard of review. *Id.* at 504, 645 S.E.2d at 221. The appellants in *McKinley* also violated Rule 28(b)(6) and Rule 10(c)(1) by failing to provide record and transcript references in support of their lone assignment of error. *Id.* at 504, 645 S.E.2d at 221.

Nevertheless, in both *Peverall* and *McKinley*, our Court determined that the violations of the Rules of Appellate Procedure were not sufficiently egregious to warrant dismissal. *Peverall*, 184 N.C. App. at 92, 645 S.E.2d at 419; *McKinley*, 183 N.C. App. at 504, 645 S.E.2d at 221. Rather, in both cases, our Court ordered the appellants to pay the printing costs of the appeal and, without engaging in a Rule 2 analysis, then addressed the merits. *Peverall*, 184 N.C. App. at 92-4, 645 S.E.2d at 419-22; *McKinley*, 183 N.C. App. at 504-08, 645 S.E.2d at 221-25.

In the present case, Defendants’ rules violations are similar to the violations at issue in *Peverall* and *McKinley*. As in *Peverall* and

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McKinley, I do not believe that the violations in the present case warrant the dismissal of Defendants' appeal. I would impose monetary sanctions on Defendants in the form of the printing costs of the appeal. Having reached the merits, I would affirm the order of the trial court.

PEGGY JOHNSON STURGILL, ADMINISTRATRIX OF THE ESTATE OF CHARLIE L. JOHNSON, PLAINTIFF v. ASHE MEMORIAL HOSPITAL, INC., DEFENDANT

No. COA06-1476

(Filed 6 November 2007)

Medical Malpractice— fall by patient—failure to use restraints—Rule 9(j) certification missing

The trial court correctly entered summary judgment for defendant based on the failure to include a Rule 9(j) certification in an action involving a disoriented patient's fall in a hospital. Plaintiff argued that the claim was for ordinary negligence arising from failure to follow a fall prevention plan and a failure of supervision, but the complaint concerned the failure to use restraints, which was a medical decision.

Appeal by plaintiff from Order entered 29 August 2006 by Judge John O. Craig, III, in Ashe County Superior Court. Heard in the Court of Appeals 10 May 2007.

Vannoy, Colvard, Triplett & Vannoy, P.L.L.C., by Daniel S. Johnson, for the plaintiff-appellant.

Sharpless & Stavola, P.A., by Brenda S. McClearn, for defendant-appellee.

STROUD, Judge.

Plaintiff appeals from an order granting defendant's motion for summary judgment because of failure to have medical care reviewed by a certifying expert as required for a medical malpractice action by Rule 9(j) of the North Carolina Rules of Civil Procedure. The dispositive issue in this case is whether the use of restraints on a patient is a medical procedure. Because we conclude that the use of restraints in the case *sub judice* is a medical procedure, we affirm.

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I. Background

“A medical assessment for the use of restraints can be delicate and complex, and as such, requires the application of clinical judgment.” According to defendant’s internal policy on restraints, the use of restraints requires an order written by a physician or a physician’s assistant (PA). When a physician or PA is not immediately available, defendant’s policy allows a nurse to initiate the use of restraints if “[b]ased on an appropriate assessment of the patient.” An appropriate assessment “includes assessing the patient’s medications, orthopedic diseases, neurological status . . . and other medical conditions.”

If a nurse initiates the use of restraints, a physician is to be notified immediately if the nurse initiates restraints based on a significant change in the patient’s condition. Otherwise, a physician or PA must be notified within one hour of a nurse’s initiation of restraints. If the restraints are to remain on the patient, a physician or PA must provide a verbal or written order.

On or about 23 November 2003, Charlie L. Johnson (“decedent”), a seventy-six year-old man, was admitted to defendant hospital. At admission, decedent was disoriented, unable to walk, and suffering from a decreased level of consciousness. Decedent’s cardiovascular, neurological and musculoskeletal systems were abnormal. Nurse Violet Barker conducted a nursing assessment of decedent upon his admission to defendant’s facility and implemented defendant hospital’s fall prevention plan (FPP), putting decedent’s bedrails in the “up” position and placing restraints on decedent.

On 24 November 2003 defendant’s employees removed the restraints from decedent. At 3:15 p.m. on 25 November 2003, defendant’s employees found decedent out of bed and sitting in a chair. Around 7:00 p.m. defendant’s employees noted that decedent was neurologically abnormal and suffering from confusion and dementia, and had a low oxygen saturation level and an irregular heartbeat. They assessed decedent as a fall risk “8” according to defendant’s FPP. Doctor Clay was notified by phone and ordered nebulizer treatments, but no restraints were placed on decedent. Around 10:00 p.m. defendant’s employees looked in on decedent and noted no distress. Decedent was not checked again until 11:30 p.m., when defendant’s staff found decedent lying on the floor in his room. Decedent was unresponsive and had suffered head injuries, fractures to his right shoulder and elbow, and injury to his right knee. Decedent was trans-

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ferred from defendant's facility to Wake Forest University Baptist Medical Center, where he remained until his death on 12 December 2003.

On 1 December 2005, Peggy Johnson Sturgill, Administratrix of the Estate of Charlie L. Johnson, filed a complaint against Ashe Memorial Hospital, Inc. Defendant answered on 18 December 2005. On 7 June 2006 defendant moved for summary judgment to dismiss the action pursuant to Rule 9(j) and Rule 56 of the North Carolina Rules of Civil Procedure on the grounds that plaintiff failed to have the medical care reviewed by a person qualified under Rule 702 of the Rules of Evidence who is willing to testify that the nursing and medical care did not comply with the applicable standard of practice. On 2 August 2006, an amended motion for summary judgment was filed by defendant to include supporting affidavits. On 3 August 2006, plaintiff submitted supporting affidavits. On 14 August 2006, Judge John O. Craig, III, heard the motion for summary judgment. On 29 August 2006, Judge Craig granted defendant's motion for summary judgment pursuant to Rule 56 and Rule 9(j) of the North Carolina Rules of Civil Procedure, dismissing the complaint with prejudice. Plaintiff appeals.

II. Standard of Review

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). A trial court's grant of summary judgment receives *de novo* review on appeal, and evidence is viewed in the light most favorable to the non-moving party. *Stafford v. County of Bladen*, 163 N.C. App. 149, 151, 592 S.E.2d 711, 713, *disc. review denied and appeal dismissed*, 358 N.C. 545, 599 S.E.2d 409 (2004).

III. Legal Analysis

Plaintiff contends the trial court erred by classifying her claim as one for medical malpractice and granting summary judgment for defendant on that basis. Plaintiff contends that defendant's motion for summary judgment should have been denied because the complaint alleges that the failure to implement defendant's FPP and failure to supervise decedent do not involve matters of specialized science or skill, therefore constitutes only a claim for ordinary negli-

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gence which does not require Rule 9(j) certification. Specifically, plaintiff contends that claims against a hospital do not necessarily allege medical malpractice, citing *Duke University v. St. Paul Fire and Marine Ins. Co.*, 96 N.C. App. 635, 640-41, 386 S.E.2d 762, 766, *disc. review denied*, 326 N.C. 595, 393 S.E.2d 876 (1990) (“[N]egligence actions against health care providers may be based upon breaches of the ordinary duty of reasonable care where the alleged breach does not involve rendering or failing to render professional services requiring special skills.”).

Plaintiff further contends that the case *sub judice* is analogous to cases in which this Court classified actions against health care providers as claims for ordinary negligence. To support this contention, plaintiff cites *Lewis v. Setty*, 130 N.C. App. 606, 503 S.E.2d 673 (1998) (moving a patient from an exam table to a wheelchair did not involve specialized knowledge or skill and as such did not constitute medical malpractice requiring Rule 9(j) certification), *Taylor v. Vencor, Inc.*, 136 N.C. App. 528, 530, 525 S.E.2d 201, 203 (“observation and supervision of the plaintiff-nursing home resident, when she smoked in the designated smoking area, did not constitute an occupation involving specialized knowledge or skill”), *disc. review denied*, 351 N.C. 646, 543 S.E.2d 889 (2000), and *Norris v. Rowan Memorial Hospital, Inc.*, 21 N.C. App. 623, 626, 205 S.E.2d 345, 348 (1974) (failing to raise the side rails on the patient’s bed in violation of hospital rules and failing to give proper attention “did not involve the rendering or failure to render professional nursing or medical services requiring special skills”).

Defendant responds that plaintiff’s complaint only alleges that decedent’s accident occurred as a result of being unrestrained. Defendant argues that because the use of restraints requires an order from a physician or PA based on clinical judgment, it is therefore a professional service, rendering plaintiff’s complaint a claim for medical malpractice, not a claim for ordinary negligence. Accordingly, defendant contends that the complaint was properly dismissed for failure to obtain and include Rule 9(j) certification.

Rule 9(j) provides, in pertinent part:

Any complaint alleging medical malpractice by a health care provider as defined in G.S. 90-21.11 in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless . . . [t]he pleading specifically asserts that the medical care has been reviewed by a person who is reasonably expected to

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qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care[.]

N.C. Gen. Stat. § 1A-1, Rule 9(j).

As used in Rule 9(j), “the term ‘medical malpractice action’ means a civil action for damages for personal injury or death arising out of the furnishing or failure to furnish *professional services* in the performance of medical, dental, or other health care by a health care provider.” N.C. Gen. Stat. § 90-21.11 (2005) (emphasis added).

“Professional services” has been defined by this Court to mean an act or service “‘arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor [or] skill involved is predominantly mental or intellectual, rather than physical or manual.’” *Smith v. Keator*, 21 N.C. App. 102, 105-06, 203 S.E.2d 411, 415 (quoting *Marx v. Hartford Accident & Indem. Co.*, 183 Neb. 12, 14, 157 N.W.2d 870, 872 (1968)), *aff’d*, 285 N.C. 530, 206 S.E.2d 203, *appeal dismissed*, 419 U.S. 1043, 42 L. Ed. 2d 636 (1974).

In determining whether or not Rule 9(j) certification is required, the North Carolina Supreme Court has held that “pleadings have a binding effect as to the underlying theory of plaintiff’s negligence claim.” *Anderson v. Assimos*, 356 N.C. 415, 417, 572 S.E.2d 101, 102 (2002); *see also Bratton v. Oliver*, 141 N.C. App. 121, 125, 539 S.E.2d 40, 43 (2000) (“A party is bound by his pleadings and, unless withdrawn, amended or otherwise altered, the allegations contained in all pleadings ordinarily are conclusive as against the pleader. He cannot subsequently take a position contradictory to his pleadings.” (citation and quotation omitted)), *disc. review denied*, 353 N.C. 369, 547 S.E.2d 808 (2001).

Plaintiff’s brief characterizes the complaint as analogous to *Norris*, contending that it is partly based on failure to implement defendant’s FPP, and also analogous to *Taylor*, contending that it is partly based on defendant’s failure to supervise decedent. However, a careful reading shows that the complaint is not based on failure to implement defendant’s FPP or on failure to supervise decedent, but is based solely on the lack of restraints on decedent.

The complaint mentions the FPP only in passing when reciting the factual background to the complaint: “nurse Violet Barker implemented the Defendant facility’s fall prevention plan and placed his

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bedrails in the 'up' position and placed restraints on the decedent." No other mention of the FPP is made in plaintiff's complaint or supporting affidavits, and the text of defendant's FPP was only admitted into the record by defendant's affidavits. Furthermore, the record indicates that the FPP was followed by defendant's employees, noting that decedent's bedrails were placed in the "up" or raised position. Plaintiff's affidavits also confirm that the bedrails were raised, in compliance with the FPP. In addition, the FPP did not require the staff to check on decedent at regular timed intervals but "every time they pass his room," and plaintiff's complaint shows compliance with this requirement with decedent being checked at varying intervals, as the nurses passed his room.

Plaintiff's complaint makes only one allegation that could be generously construed as being based on the failure of defendant to supervise decedent.

14. At 11:30 p.m., on November 25, 2003, the nursing staff checked Decedent for the first time in an hour and a half. At this time, nurse Sharon Hartzog found the Decedent lying on the floor in his room.

Plaintiff does not allege that defendant had any duty to check on decedent sooner than within an hour and a half, and makes no allegation as to how failing to check on plaintiff during that hour and a half caused plaintiff's injuries. *See City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 656, 268 S.E.2d 190, 194 (1980) (listing the essential elements of a negligence claim).

While we do not find any allegation in the complaint that alleges ordinary negligence based on failure to follow the FPP, or based on failure to supervise, plaintiff's complaint does state that:

15. As a direct and proximate result of the Decedent *being unrestrained*, the Decedent was able to climb out of his bed and fall. (Emphasis added.)

From the plain meaning of this statement, plaintiff is basing her complaint on defendant's lack of restraints on decedent as the cause of decedent's fall and resulting injuries, not on the failure to follow the FPP or failure to supervise. In addition, plaintiff's complaint noted the failure of defendant to put restraints on decedent or the lack of restraints on decedent at least seven times. Furthermore, plaintiff's accompanying affidavits state:

If he had been *properly restrained*, my father would not have been able to have gotten out of bed and fallen . . . If he had been *properly restrained*, Mr. Johnson would not have been able to have gotten out of bed and fallen.

(Emphasis added.)

This statement further shows that the claim was based solely on the hospital's lack of restraints on decedent.

It is undisputed in the record that the use of restraints is a medical decision that normally "requires an order written by a physician or physician's assistant." It is also undisputed in the record that "[a] medical assessment for the use of restraints can be delicate and complex, and as such, requires the application of clinical judgment." Although a nurse can administer restraints on a patient, as nurse Barker did on 23 November 2003, a physician or PA must be notified within one hour and provide an order for the restraint to remain. Because the decision to apply restraints is a medical decision requiring clinical judgment and intellectual skill, *see Smith v. Keator*, 21 N.C. App. at 105-06, 203 S.E.2d at 415, it is a professional service. Consequently, plaintiff's complaint is a claim for medical malpractice, thus requiring rule 9(j) certification.

Finally, plaintiff attempted to put a catch-all negligence allegation in her complaint:

17. At the times and places set forth above, the Defendant, through its employees and agents, were [sic] negligent by failing to act reasonably and diligently with regard to the care, safety, and well-being of the Decedent.

This statement makes reference to the "times and places set forth above," each of which, other than the basic factual context and allegations regarding the state of decedent's health, refers to the lack of restraints placed on decedent.

Although the facts in the case *sub judice* are somewhat similar to the cases cited by plaintiff, she has chosen to base her complaint on the lack of restraints on decedent. Plaintiff did not assert a theory of ordinary negligence in her pleadings based on the failure to implement the FPP or failure to supervise decedent. On review, plaintiff is bound by her pleadings, and may not raise this new theory of negligence for the first time on appeal.

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IV. Conclusion

Rule 9(j) provides that “[a]ny complaint alleging medical malpractice . . . shall be dismissed” if it does not comply with the certification mandate. N.C. Gen. Stat. § 1A-1, Rule 9(j); *Thigpen v. Ngo*, 355 N.C. 198, 202, 558 S.E.2d 162, 165 (2002). (“[M]edical malpractice complaints have a distinct requirement of expert certification with which plaintiffs must comply. Such complaints will receive strict consideration by the trial judge. Failure to include the certification necessarily leads to dismissal.”). For the reasons stated above, we hold that plaintiff’s original complaint was for medical malpractice and required Rule 9(j) certification. Because Rule 9(j) certification was not included in plaintiff’s complaint, the trial court’s entry of summary judgment for defendant is affirmed.

Affirmed.

Judges McCULLOUGH and BRYANT concur.

DOUGLAS BROWN, SR., PLAINTIFF v. REFUEL AMERICA, INC., IAN WILLIAMSON, AND S. BRUCE WUNNER, DEFENDANTS, AND REFUEL AMERICA, INC., THIRD-PARTY PLAINTIFF v. DOUGLAS BROWN, SR., L. RAY THOMAS, AND RAY THOMAS PETROLEUM COMPANY, INC., THIRD-PARTY DEFENDANTS

No. COA07-304

(Filed 6 November 2007)

Jurisdiction— personal jurisdiction—corporate activities

The trial court did not err by concluding that personal jurisdiction was properly asserted over nonresident defendants where they had asserted that their actions in North Carolina were as agents of corporate entities. The cases cited do not support the contention that the actions of a defendant as an employee or agent of another may not be considered for the purpose of establishing personal jurisdiction over defendant, and relevant North Carolina jurisprudence is to the contrary.

Appeal by Defendants from an order entered 5 January 2007 by Judge J. Gentry Caudill in Cleveland County Superior Court. Heard in the Court of Appeals 18 September 2007.

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Robinson, Bradshaw & Hinson, P.A., by Garland S. Cassada and Jonathan C. Krisko, for Douglas Brown, Sr. Plaintiff-Appellee.

Forman Rossabi Black, P.A., by Amiel J. Rossabi and Emily J. Meister, for Ian Williamson and S. Bruce Wunner Defendants/Third Party Plaintiff-Appellants.

ARROWOOD, Judge.

Defendants, Ian Williamson and S. Bruce Wunner, appeal from the denial of their motion to dismiss for lack of personal jurisdiction. We affirm.

The record establishes the following: Defendant Refuel America, Inc. (Refuel), which is not a party to this appeal, is a Delaware corporation with offices in Charlotte, North Carolina. Defendant Ian Williamson, a resident of the United Kingdom, is the President and a Director of Refuel; Defendant Bruce Wunner, a resident of Florida, is Refuel's Chief Executive Officer and Vice Chairman of its Board of Directors. Ray Thomas Petroleum Company, Inc., (Thomas Petroleum) is a North Carolina corporation based in Shelby, North Carolina.

In 2005 Thomas Petroleum owed Plaintiff a sum in excess of \$2,000,000.00. That year the parties negotiated a commercial transaction involving Plaintiff's loan of an additional one million dollars (\$1,000,000.00) to Thomas Petroleum; Refuel's acquisition of Thomas Petroleum; and Refuel's issuance to Plaintiff of shares in Refuel. However, after Refuel's anticipated purchase of Thomas Petroleum failed to take place, a dispute arose among the parties regarding various aspects of their agreement and the proper disposition of shares in Refuel.

On 16 August 2006 Plaintiff filed suit against Defendants seeking a declaratory judgment establishing his ownership of certain shares in Refuel, and seeking damages for fraud, breach of contract, breach of fiduciary duty, civil conspiracy, negligent misrepresentation, and securities fraud. Defendants filed an unverified answer that included a motion for dismissal of Plaintiff's complaint for lack of personal jurisdiction over either Defendant. The trial court denied their motion in an order filed 5 January 2007, from which Defendants have appealed.

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Standard of Review

Defendants appeal from the court's denial of their motion to dismiss for lack of personal jurisdiction.

Preliminarily, we note that this appeal, while interlocutory, is properly before us because motions to dismiss for lack of personal jurisdiction are statutorily deemed to be immediately appealable. N.C. Gen. Stat. § 1-277(b) (2005) ("Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant[.]").

Fox v. Gibson, 176 N.C. App. 554, 556-57, 626 S.E.2d 841, 843 (2006).

"Whether the courts of this State may exercise personal jurisdiction over a nonresident defendant involves a two-prong analysis: '(1) Does a statutory basis for personal jurisdiction exist, and (2) If so, does the exercise of this jurisdiction violate constitutional due process?' The assertion of personal jurisdiction over a defendant comports with due process if defendant is found to have sufficient minimum contacts with the forum state to confer jurisdiction."

Jaeger v. Applied Analytical Indus. Deutschland GMBH, 159 N.C. App. 167, 170, 582 S.E.2d 640, 643 (2003) (quoting *Golds v. Central Express Inc.*, 142 N.C. App. 664, 665-66, 544 S.E.2d 23, 25 (2001)).

As a practical matter, the two-step analysis collapses into the single question of "whether due process of law would be violated by permitting the courts of this jurisdiction to exercise their power over defendant[:]"

By the enactment of G.S. [§] 1-75.4(1)(d) [permitting jurisdiction over any defendant 'engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise'], it is apparent that the General Assembly intended to make available to the North Carolina courts the full jurisdictional powers permissible under federal due process. . . . Thus, we hold that G.S. [§] 1-75.4(1)(d) . . . statutorily, grants the courts of North Carolina the opportunity to exercise jurisdiction over defendant to the extent allowed by due process.

Dillon v. Funding Corp., 291 N.C. 674, 676, 231 S.E.2d 629, 630-31 (1977).

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“Upon a defendant’s personal jurisdiction challenge, the plaintiff has the burden of proving *prima facie* that a statutory basis for jurisdiction exists. Where unverified allegations in the plaintiff’s complaint meet plaintiff’s initial burden of proving the existence of jurisdiction and defendant does not contradict plaintiff’s allegations in its sworn affidavit, such allegations are accepted as true and deemed controlling[.]” *Wyatt v. Walt Disney World, Co.*, 151 N.C. App. 158, 162-63, 565 S.E.2d 705, 708 (2002) (alterations omitted) (internal quotation marks and citations omitted). However, where the defendant submits an affidavit in support of his motion to dismiss for lack of personal jurisdiction, the court will “look to the uncontroverted allegations in the complaint and the uncontroverted facts in the sworn affidavit” in its determination of the issue. *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 616, 532 S.E.2d 215, 218, *disc. review denied*, 353 N.C. 261, 546 S.E.2d 90 (2000). Factual allegations in Defendants’ unverified answer are not competent evidence; therefore, we assume the trial court did not consider these and do not consider them on appeal. *See, e.g., Spinks v. Taylor and Richardson v. Taylor Co.*, 303 N.C. 256, 278 S.E.2d 501 (1981) (holding, in context of summary judgment proceeding, that verified complaint may be treated as affidavit); *Excel Staffing Serv., Inc. v. HP Reidsville, Inc.*, 172 N.C. App. 281, 283, 616 S.E.2d 349, 351 (2005) (“Filing an unverified answer to a complaint does not constitute a response to requests for admissions[.]”); *Hill v. Hill*, 11 N.C. App. 1, 10, 180 S.E.2d 424, 430 (1971) (“An unverified complaint is not an affidavit or other evidence.”).

“The determination of whether jurisdiction is statutorily and constitutionally permissible due to contact with the forum is a question of fact. The standard of review of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court.” *Replacements, Ltd v. MidweSterling*, 133 N.C. App. 139, 140-41, 515 S.E.2d 46, 48 (1999) (citations omitted). “Moreover, if the trial court’s findings of fact resolving the defendant’s jurisdictional challenge ‘are not assigned as error, the court’s findings are ‘presumed to be correct.’ ” *Wyatt*, 151 N.C. App. at 163, 565 S.E.2d at 709 (quoting *Inspirational Network, Inc. v. Combs*, 131 N.C. App. 231, 235, 506 S.E.2d 754, 758 (1998)).

We first note that the trial court’s denial of Defendants’ dismissal motion included the following unchallenged findings of fact, which are thus conclusively established, *See Wyatt*:

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2. . . . [T]he Individual Defendants on multiple occasions, visited the State of North Carolina, evaluating aspects of a transaction involving the acquisition of Thomas Petroleum Company, Inc., a North Carolina company headquartered in Shelby. While the Individual Defendants were within the State, they proposed Plaintiff Brown's involvement in this Venture, which they planned to locate in North Carolina.
3. All of the Individual Defendants' communications with Plaintiff, from which this action arises, occurred while one or both Individual Defendants were located in North Carolina, or were directed to Brown while he was located in North Carolina.
4. The offer by Williamson, on behalf of Wunner and their affiliates, for Plaintiff Brown to participate in the Venture was made to Brown in North Carolina.
5. Williamson delivered a share certificate, containing certifications by both Williamson and Wunner that the share certificate represented shares owned by Brown in North Carolina. In addition, Williamson accepted from Brown on behalf of himself, Wunner, and their affiliates, a \$1 million loan proceeds check and another check in North Carolina.
6. In the Complaint, Brown asserts that Williamson's and Wunner's conduct within and without the State, including their fraudulent representations, misleading statements and omissions, among other things: (i) induced Brown to pay the \$1 million loan proceeds to Thomas Petroleum, from which Williamson's and Wunner's affiliates (including a company owned by Wunner) obtained benefits of approximately \$239,000; and (ii) allowed Williamson and Wunner to obtain increased benefits through the Share Exchange described in the Complaint.
7. In the Complaint, Brown asserts that Williamson's and Wunner's actions, in and directed toward the State of North Carolina, have denied Brown his equity interest in Refuel, and the value of participating in the Share Exchange, and benefited each of Williamson and Wunner personally.
8. Refuel, a company formed by Williamson, Wunner and their affiliates, and NewGen Technologies, Inc., Refuel's parent, maintain offices in Charlotte, North Carolina. Williamson con-

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tinues to serve as President and Director of Refuel. Wunner serves as Refuel's Chief Executive Officer and Vice Chairman of the Board of Directors. Williamson and Wunner continue to maintain offices of those companies located in Charlotte, North Carolina through which they have corresponded with Brown.

N.C. Gen. Stat. § 1-75.4 (2005) governs North Carolina's exercise of personal jurisdiction over a nonresident defendant. In the instant case, the court found jurisdiction to exist under the following statutory provisions authorizing the exercise of personal jurisdiction over a nonresident defendant where the plaintiff's claim arose from:

§ 1-75.4(3) . . . an act or omission within this State by the defendant.

§ 1-75.4(4)(a.) . . . an act or omission outside this State by the defendant . . . [if at] the time of the injury . . . Solicitation or services activities were carried on within this State by or on behalf of the defendant;

§ 1-75.4(5)(c.) . . . a promise [to the plaintiff] . . by the defendant to deliver or receive within this State . . . documents of title, or other things of value;

§ 1-75.4(6)(c.) . . . [a] claim that the defendant return, restore, or account to the plaintiff for any asset or thing of value which was within this State at the time the defendant acquired possession or control over it.

We easily conclude that the uncontradicted findings support the court's conclusions that both Williamson and Wunner were subject to the court's jurisdiction as defined by statute, and that their "contacts with North Carolina support the exertion of 'specific' jurisdiction, and therefore, the exercise of jurisdiction by this Court over their persons does not violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution."

We have considered and we reject Defendants' argument to the contrary. Defendants do not argue the lack of evidence of the occurrence of events set out in the trial court's findings of fact. Instead, their sole argument is that, regardless of the accuracy of the court's findings about their actions, actions they took while acting as agents of "corporate entities" don't "count" as part of the determination of jurisdiction. Defendants assert in their brief that:

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absent a showing that a corporate officer or employee acted as the alter ego of the corporation or outside of his official capacity . . . jurisdiction cannot be asserted over a corporate agent without affirmative acts committed in the agents individual capacity[.]

On the basis of this contention, Defendants argue that the exercise of personal jurisdiction is defeated because:

The evidence . . . shows that the actions of Defendants Williamson and Wunner were taken or made on behalf of corporate entities for which they were employed or otherwise acted as an agent. No evidence exists as to the acts of Defendants Williamson and Wunner individually and personally.

Defendants cite *Godwin v. Walls*, 118 N.C. App. 341, 455 S.E.2d 473 (1995) and *Robbins v. Ingham*, 179 N.C. App. 764, 635 S.E.2d 610 (2006), *disc. review denied*, 361 N.C. 221, 642 S.E.2d 448 (2007) as support for their position that if “an individual acts not in his personal capacity but on behalf of another, North Carolina courts have refused to consider or count such actions for purposes of establishing personal jurisdiction over the individual[.]” This reliance is misplaced because, neither of these cases holds that, for purposes of determining the extent of a defendant’s contacts with North Carolina, the actions of a defendant taken as an employee or agent of another do not “count.”

Additionally, relevant North Carolina jurisprudence has held to the contrary. *See, e.g., Buying Group, Inc. v. Coleman*, 296 N.C. 510, 515, 251 S.E.2d 610, 614 (1979) (where defendant was a principal shareholder and agent for corporation, this Court holds “his corporate acts may be attributed to him for the purpose of determining whether the courts of this State may assert personal jurisdiction over him”); *Centura Bank v. Pee Dee Express, Inc.*, 119 N.C. App. 210, 213, 458 S.E.2d 15, 18 (1995) (acts taken in North Carolina by defendant who is officer and principal shareholder in corporation may be imputed to defendant individually for purpose of determining existence of minimum contacts) (citations omitted). In the instant case, it is undisputed that Defendants were officers and principals in Refuel.

As discussed above, North Carolina common law interprets G.S. § 1-75.4 to extend jurisdiction to the full extent permitted by the Due Process Clause of the U.S. Constitution. In this regard, we find it persuasive that in *Calder v. Jones*, 465 U.S. 783, 79 L. Ed. 2d 804 (1984), the United States Supreme Court expressly rejected the argument made by the instant Defendants. The *Calder* defendant, a Florida res-

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ident and newspaper reporter, challenged California's exercise of personal jurisdiction over him on the basis that, notwithstanding his contacts with California, principles of due process prohibited exercise of jurisdiction on the basis of his actions as an employee of the newspaper. The United States Supreme Court disagreed:

Petitioners are correct that their contacts with California are not to be judged according to their employer's activities there. On the other hand, their status as employees does not somehow insulate them from jurisdiction. Each defendant's contacts with the forum State must be assessed individually. . . . In this case, petitioners are primary participants in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction over them is proper on that basis.

Calder, 465 U.S. at 790, 79 L. Ed. 2d at 813. Finally, we note that Plaintiff has moved to dismiss this appeal as frivolous and for sanctions. Appellants did not respond to the motion. Nevertheless, we have reviewed the substance of the appeal. As stated above, we find the appeal to be without merit, however, in our discretion, we decline to impose sanctions.

The trial court did not err in concluding that personal jurisdiction was properly asserted over Defendants, and that its order is

Affirmed.

Chief Judge MARTIN and Judge STROUD concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. ROBERT ELESTER GOODWIN,
DEFENDANT

No. COA06-1395

(Filed 6 November 2007)

Evidence— prior crimes or bad acts—useful only to show propensity to violence—prejudicial

The trial court erred in an assault prosecution in which defendant claimed self-defense by allowing the State to cross-examine defendant about prior assault charges in which defendant claimed self-defense and which were voluntarily dismissed.

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The evidence could only be considered as proof of defendant's violent disposition, and specifically his propensity to attack on slight provocation and then claim self-defense. The error was prejudicial because there were no witnesses other than the victim and defendant, and the evidence certainly could have had a significant effect upon defendant's credibility. N.C.G.S. § 8C-1, Rule 404(b).

Appeal by defendant Robert Elester Goodwin from judgment entered 2 June 2006 by Judge James W. Morgan in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 April 2007.

Attorney General Roy A. Cooper, III, by Assistant Attorney General, Stormie D. Forte, for the State.

Russell J. Hollers, III, for Defendant-Appellant.

STROUD, Judge.

Defendant appeals from his conviction of assault with a deadly weapon inflicting serious injury (AWDWISI). Defendant contends that the trial court erred in allowing the State to cross-examine him about criminal charges from 1997 and 2001 which were voluntarily dismissed.¹ We agree. For the reasons stated below, we set aside defendant's conviction for AWDWISI and remand for a new trial.

I. Background

Defendant and Larry Howard ("Howard"), a younger, taller, heavier, and stronger man, lived in the same boarding house. Defendant customarily collected weekly rents from the tenants in the boarding house on behalf of the owner.

On 19 November 2004, defendant stabbed Howard in the abdomen with a knife, cutting his intestines and the main artery to his lung. Howard was taken to the hospital, where he had surgery and was hospitalized for about a week. Defendant and Howard were the only witnesses to the incident who testified at trial.

Defendant offered the following version of the incident: Defendant was drinking beer the afternoon of 19 November 2005. Howard paid his rent to defendant that afternoon, but then came

1. Defendant also contends that the trial court erred in sentencing him as a level III offender based on his prior convictions in New Jersey, however, because we grant defendant a new trial, the sentencing issue becomes moot.

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back about an hour later and wanted \$35 or \$40 of his rent money back to give to April, his female companion. Defendant refused. After being denied return of the money, Howard went away, then returned about ten minutes to throw a beer bottle through a window at defendant. Defendant and Howard then got into a "scuffle." Howard hit defendant on the shoulder with a two to three feet long iron pipe. In an effort to protect himself from his younger, taller, stronger and heavier adversary, defendant swung a knife at Howard.

Howard offered a very different version of the incident: After getting off work on 19 November 2004, Howard went to pay his rent to defendant. After paying his rent, Howard then left to get groceries. When he returned to the boarding house, he saw defendant and April in defendant's room. Defendant was drunk and enraged. It appeared to Howard that April was frightened of defendant and that she wanted to get out of defendant's room. Howard confronted defendant about April wanting to leave and then opened the door to let her out. After Howard turned back around, defendant stabbed him in the stomach with a knife. Howard testified that he did not have any sort of tool or weapon and that he did not threaten defendant in any way prior to the stabbing. After the stabbing, Howard was able to see that defendant had a pocketknife in his hand. Howard immediately left the boarding house and went to a nearby convenience store to call the police and an ambulance.

Two police officers, Robert Childs and Stephen Begley, responded to the call. They were able to talk to Howard briefly at the convenience store before he began to receive medical attention. They testified that Howard told the officers that defendant had stabbed him at the boarding house. Officers Childs and Begley, along with Officer Reeves, who did not testify, went to the boarding house. They found defendant in an obvious state of intoxication. Defendant initially denied that an altercation or stabbing had occurred at the boarding house, but then acknowledged that he had an argument with one of his roommates because the roommate wanted some of his rent money back. Defendant gave the officers permission to search his room for a knife, and then showed the officers a small pocketknife which he had on his person. Officer Begley then found a large pocketknife with blood and flesh on it on defendant's bed. After the discovery of the knife, defendant told the officers that Howard had confronted him with a pipe bender and he had pulled out the knife and swung it at Howard to get him to back off. The officers searched the residence and surrounding area for a pipe bender or pipe but did not locate either.

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On 7 March 2005, the Mecklenburg County Grand Jury indicted defendant for AWDWISI. Defendant was tried before a jury in Superior Court, Mecklenburg County on 1 June 2006. The jury found defendant guilty of AWDWISI. Upon the jury verdict, the trial court sentenced defendant to 30 to 45 months, within the presumptive range, based on a prior record level III. Defendant appeals.

II. Rule 404(b)

Defendant argues that the trial court erred in allowing the State to cross-examine him about two prior incidents which resulted in criminal charges that the State voluntarily dismissed. The testimony assigned as error was elicited beginning with the State's cross-examination of defendant as follows:

Q: Do you recall an incident [on 13 July 1997] where you stabbed a man multiple times and told police that he had threatened you?

[Defendant objected and was overruled.]

A: I didn't stab him multiple times; I cut the guy twice.

....

Q: Do you recall where you cut him?

A: I cut him on the arm . . . and in the chest.

....

Q: You did that because you said he had threatened you, right?

A: Yes; he did.

....

Q: And do you recall on [20 August 2001] that you hit a man in the head with [a] baseball bat because you said he had threatened you?

[Defendant objected and was overruled.]

A: I hit the man one time with a baseball bat.

[The defense begins re-direct examination of defendant.]

Q: Isn't it true that [those two charges] were dismissed . . . and you never even had to come to court for them?

....

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A: [Correct.]

[The State begins re-cross examination of defendant.]

Q: You don't know why [those two charges] were dismissed though, do you?

[Defendant objected and was overruled.]

A: They were dismissed, I don't know why.

Defendant argues that admission of this testimony was error because its sole purpose was to show defendant's propensity to commit crimes similar to the one charged, in violation of N.C. Gen. Stat. 8C-1, § Rule 404(b).² He argues that the erroneous admission of this testimony prejudiced him, because the only witnesses to the alleged crime were defendant and the victim, Howard, and the case therefore turned on defendant's credibility.

The State contends that the purpose of the evidence was not to prove defendant's character or his propensity to commit the type of crime for which he was charged, but to show that defendant had the mistaken belief that he could claim self-defense, since he had also "mistakenly" claimed self-defense in 1997 and 2001.

We reject the State's argument. This case is analogous to *State v. Morgan*, 315 N.C. 626, 340 S.E.2d 84 (1986). In *Morgan*, the defendant shot the victim with a shotgun at the defendant's place of business. *Id.* at 628-29, 340 S.E.2d at 86. As a result, the defendant was charged with first-degree murder. *Id.* at 627, 340 S.E.2d at 86. The defendant testified that he was acting in self-defense. *Id.* at 631, 340 S.E.2d at 88. The State then cross-examined the defendant regarding his pointing a shotgun at a man at the defendant's place of business about three months prior to the alleged murder of the victim. *Id.* The State's argument in *Morgan* was essentially the same as in this case:

The State here contends that the evidence brought out during defendant's cross-examination was admissible under Rule 404(b) because it was relevant to the issue of whether defendant was the aggressor in the altercation he described during direct examina-

2. N.C. Gen. Stat. § 8C-1, Rule 404(b) reads in pertinent part:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

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tion. Since defendant claimed he shot [the victim] in self-defense and since the aggressor in an affray cannot claim the benefit of self-defense unless he has abandoned the fight and has withdrawn by giving notice to his adversary, whether the defendant was the aggressor was a contested element of defendant's self-defense claim. The State asserts that this evidence, therefore, was relevant to show that defendant's pointing of the shotgun at the decedent and shooting him was not in self-defense.

Morgan, 315 N.C. at 637-38, 340 S.E.2d at 91-92 (internal citation and quotation omitted).

Rejecting the State's argument, the Supreme Court held that

[t]he State's rationale is precisely what is prohibited by Rule 404(b). In order to reach its conclusion, the State is arguing that, because defendant pointed a shotgun at Mr. Hill three months earlier, he has a propensity for violence and therefore he must have been the aggressor in the alleged altercation with [the victim] and, thus, could not have been acting in self-defense.

Id. at 638, 340 S.E.2d at 92.

In the case *sub judice*, the State has emphasized defendant's "mistaken" belief that he had any right to claim self-defense, apparently trying to fit the proffered evidence into the "absence of mistake" purpose as listed in Rule 404(b). We have been unable to determine how evidence that defendant was *mistaken* could possibly tend to prove an "*absence of mistake*." Even if the purpose of the evidence as the State proposes could be proper, the record also contains no indication that defendant was in fact mistaken regarding his belief that he had a right to claim self-defense in the 1997 and 2001 incidents—there is simply not sufficient information in the record regarding those incidents for anyone to make such a determination. All the jury could possibly draw from the evidence of the 1997 and 2001 incidents, as it was presented was defendant's propensity for violence. Thus, we are left with the admission of evidence which could only be considered as proof of defendant's violent disposition, and specifically his propensity to attack others on slight provocation and then to claim self-defense without justification. "The theory of relevancy articulated by the State on this appeal is plainly prohibited by the express terms of Rule 404(b) disallowing "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show that he acted in conformity therewith." 315 N.C. at 638, 340 S.E.2d at 92 (quoting N.C. Gen. Stat. § 8C-1, Rule 404(b)).

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We must next consider whether the erroneous admission of evidence of the 1997 and 2001 incidents prejudiced defendant. “The test for prejudicial error is whether there is a reasonable possibility that, had the error not been committed, a different result would have been reached at trial.” *State v. Scott*, 331 N.C. 39, 413 S.E.2d 787 (1992) (citing N.C. Gen. Stat. § 15A-1443(a)). We conclude that there is a reasonable possibility that the jury would have reached a different result if this evidence had not been admitted. In the case *sub judice*, there were no witnesses to the assault other than victim and the defendant. There was evidence attacking the credibility of both the victim and defendant, including impairment by drugs and/or alcohol at the time of the assault. There was no dispute that defendant stabbed the victim, so the physical evidence actually recovered by the police neither supports nor refutes defendant’s claim of self-defense. It is true that the police did not find the pipe which defendant claimed that Howard wielded against him, but considering all of the evidence, we cannot conclude that the error was harmless. Evidence of not just one, but two, prior assaults by defendant, under similar circumstances, and his claims of self-defense which the State stressed as “mistaken” could certainly have had a significant effect upon the jury’s assessment of defendant’s credibility.

We therefore hold that the trial court erred in its admission of evidence of the 1997 and 2001 incidents pursuant to Rule 404(b), and that this error prejudiced defendant. We set aside defendant’s conviction for AWDWISI, and remand for a new trial. Due to our ruling on this issue, we need not address defendant’s assignment of error to his sentence.

New trial.

Judges McCULLOUGH and BRYANT concur.

SELWYN VILLAGE HOMEOWNERS ASS'N v. CLINE & CO.

[186 N.C. App. 645 (2007)]

SELWYN VILLAGE HOMEOWNERS ASSOCIATION, PLAINTIFF v. CLINE & COMPANY,
INC., DEFENDANT

No. COA07-116

(Filed 6 November 2007)

Appeal and Error— assignments of error—record page number omitted—format incorrect—Rule 2 not invoked

Defendant's appeal was dismissed for appellate rules violations where defendant did not identify any assignment of error by the page where it appears in the record, used an improper index margin, double-spaced captions and headings, and used no appendix page reference, in violation of Appellate Rules 28(b)(6) and 26(g). Defendant did not amend or correct its violations and deficiencies. Appellate Rule 2 was not invoked to consider the appeal because nothing in the record or briefs demonstrated exceptional circumstances to suspend or vary the rules.

Appeal by defendant from order and judgment entered 20 September 2006 by Judge Linwood O. Foust in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 October 2007.

DeVore, Acton & Stafford, PA, by Fred W. DeVore, III, for plaintiff-appellee.

Clontz & Clontz, PLLC, by Ralph C. Clontz, III, for defendant-appellant.

TYSON, Judge.

Cline & Company, Inc. ("defendant") appeals from order entered enforcing a settlement agreement with Selwyn Village Homeowners Association ("plaintiff") and from judgment entered awarding plaintiff \$26,000.00. We dismiss defendant's appeal.

I. Background

In June 2003, plaintiff's condominium units were flooded during a rain storm. During this time, defendant was responsible for managing plaintiff's homeowners association. Edwards, Church & Muse, Inc. ("ECM") provided hazard insurance to plaintiff. Plaintiff made a timely claim, together with a proof of loss under the insurance policy obtained by defendant and EMC for the association. Plaintiff subsequently discovered the property was grossly underinsured. Plaintiff

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brought an action against defendant and ECM alleging breach of contract and negligence.

On 26 April 2006, during the third day of trial, the parties settled the case. The settlement agreement provided defendant shall pay \$26,000.00 to plaintiff in installments and the terms of the settlement shall include a confidentiality and non-disparagement agreement. The confidentiality and non-disparagement provisions were to be “worked out” by the parties in a mutually agreeable consent order.

On 25 May 2006, while negotiations were underway concerning the wording of the consent order, plaintiff’s counsel was asked by plaintiff’s board of directors to explain the settlement terms to members of its homeowners association. Defendant discovered this disclosure and refused to finalize the settlement documents or to make payment to plaintiff. Defendant argued the disclosure by plaintiff’s counsel to the members of plaintiff’s homeowners association violated the confidentiality and non-disparagement agreement and rendered the settlement void.

On 12 July 2006, plaintiff filed a notice of voluntary dismissal with prejudice against ECM regarding this action. On 19 July 2006, plaintiff moved to enforce the settlement agreement. The trial court granted plaintiff’s motion. Defendant appeals.

II. Issues

Defendant argues the trial court erred by: (1) concluding plaintiff did not breach the terms of the settlement agreement; (2) finding members of plaintiff’s homeowners association were clients of plaintiff’s counsel and were entitled to receive the settlement information; (3) concluding plaintiff’s counsel did not intend his report to disclose information other than what related to the settlement agreement; (4) finding that Kelly Ann Cline “surreptitiously” recorded communications between plaintiff’s counsel and plaintiff’s members; (5) concluding the disclosures made by plaintiff’s counsel were not damaging to defendant; and (6) entering judgment against defendant.

III. Motion to Dismiss for Appellate Rules Violations

On 18 May 2007, plaintiff moved to dismiss defendant’s appeal for numerous appellate rule violations. Defendant has failed to amend or correct the errors raised in plaintiff’s motion to dismiss.

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A. Appellate Rules Violations

“It is well settled that the Rules of Appellate Procedure are mandatory and not directory. Thus, compliance with the Rules is required.” *State v. Hart*, 361 N.C. 309, 311, 644 S.E.2d 201, 202 (2007) (internal citations and quotations omitted).

Our Supreme Court’s interpretation and application of the Appellate Rules is neither new nor has changed in the past 120 years. In 1889, in the case of *Walker v. Scott*, our Supreme Court stated:

The impression seems to prevail, to some extent, that the Rules of Practice prescribed by this Court are merely directory—that they may be ignored, disregarded and suspended almost as of course. This is a serious mistake. The Court has ample authority to make them. (The Const., Art. IV, sec. 12; The Code, sec. 961; *Rencher v. Anderson*, 93 N.C. 105 [(1885)]; *Barnes v. Easton*, 98 N.C. 116, 3 S.E. 744 [(1887)].) They are deemed essential to the protection of the rights of litigants and the due administration of justice. They have force, and the Court will certainly see that they have effect and are duly observed, whenever they properly apply.

102 N.C. 487, 490, 9 S.E. 488, 489 (1889).

Nearly eighty years ago, our Supreme Court also stated:

We have held in a number of cases that the rules of this Court, governing appeals, are mandatory and not directory. They may not be disregarded or set at naught (1) by act of the Legislature, (2) by order of the judge of the Superior Court, (3) by consent of litigants or counsel. *The Court has not only found it necessary to adopt them, but equally necessary to enforce them and to enforce them uniformly.*

Pruitt v. Wood, 199 N.C. 788, 789-90, 156 S.E. 126, 127 (1930) (emphasis supplied).

“‘[V]iolation of the mandatory rules will subject an appeal to dismissal.’ ” *Hart*, 361 N.C. at 311, 644 S.E.2d at 202 (quoting *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999)). “[W]hen [our Supreme] Court said an appeal is subject to dismissal for rules violations, it did not mean that an appeal shall be dismissed for any violation. Rather, subject to means that dismissal is one possible sanction.” *Id.* at 313, 644 S.E.2d at 203 (internal citations and quotations omitted). Some sanction, other than dismissal, may be appro-

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appropriate pursuant to Rule 25(b) or Rule 34 of the North Carolina Rules of Appellate Procedure. *Id.* at 311, 644 S.E.2d at 202. “[T]he Rules of Appellate Procedure must be consistently applied; otherwise, the Rules become meaningless, and an appellee is left without notice of the basis upon which an appellate court might rule.” *Viar v. N.C. DOT*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (citing *Bradshaw v. Stansberry*, 164 N.C. 356, 79 S.E. 302 (1913)).

1. Appellate Rule 28(b)(6)

Plaintiff appropriately moved for and argues that defendant’s appeal should be dismissed for failure to comply with Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure. We agree.

In the argument section of defendant’s brief, defendant states the questions presented and references the assignments of errors pertinent to the question. Defendant failed to identify the pages at which the assignments of error appear in the record following the questions presented.

Appellate Rule 28(b)(6) provides, in relevant part, that an appellate brief shall contain:

An argument, to contain the contentions of the appellant with respect to each question presented. Each question shall be separately stated. Immediately following each question shall be a reference to the assignments of error pertinent to the question, *identified by their numbers and by the pages at which they appear in the printed record on appeal.*

N.C.R. App. P. 28(b)(6) (2007) (emphasis supplied).

“This Court has noted that when the appellant’s brief does not comply with the rules by properly setting forth exceptions and assignments of error with reference to the transcript and authorities relied on under each assignment, it is difficult if not impossible to properly determine the appeal.” *Steingress*, 350 N.C. at 66, 511 S.E.2d at 299 (citing *State v. Newton*, 207 N.C. 323, 329, 177 S.E. 184, 187 (1934)). Defendant’s failure to identify any assignment of error by the page where it appears in the record following the question presented violates Appellate Rule 28(b)(6) and subjects its appeal to dismissal.

2. Appellate Rule 26(g)

Plaintiff also argues defendant’s appeal should be dismissed for failure to comply with Rule 26(g) of the North Carolina Rules of Appellate Procedure. We agree.

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Appellate Rule 26(g)(1) provides, in relevant part, “[t]he format of all papers presented for filing *shall* follow the additional instructions found in the Appendixes to these Appellate Rules.” N.C.R. App. P. 26(g)(1) (2007) (emphasis supplied). Appendix B states, “[t]he index should be indexed approximately 3/4” from each margin, providing a five inch line.” N.C.R. App. P. apps. b (2007). “[C]aptions, headings, and long quotes” should be single-spaced. *Id.* Appendix E states, “[t]he Appendix should include a table of contents, showing the pertinent contents of the appendix, the transcript or appendix page reference and a reference back to the page of the brief citing the appendix.” N.C.R. App. P. apps. e (2007).

In *Lewis v. Craven Reg'l Medical Ctr.*, this Court stated, “[b]ecause defendants have not complied with Rule 26, we could elect not to consider their brief . . .” 122 N.C. App. 143, 147, 468 S.E.2d 269, 273 (1996), *aff'd*, 352 N.C. 668, 535 S.E.2d 33 (2000); *see Bradshaw*, 164 N.C. at 356, 79 S.E. at 302 (“The motion of the appellee to dismiss the appeal for failure to print the record and briefs in accordance with the rules of this Court is allowed.”). Defendant’s brief violates Appellate Rule 26(g)(1) by containing: (1) an improper index margin; (2) double-spaced captions and headings; and (3) no appendix page reference. Defendant acknowledged its violations of these rules and has made no attempt to correct, amend, or substitute its brief. Defendant’s failure to comply with Appellate Rule 26(g)(1) subjects its appeal to dismissal. *Id.*

B. Discretionary Invocation of Appellate Rule 2

In light of our Supreme Court’s decision in *Hart*, we must determine whether to invoke and apply Rule 2 despite defendant’s appellate rules violations and review the merits of its appeal. 361 N.C. 309, 644 S.E.2d 201. Under these facts, we decline to do so.

Rule 2 of the North Carolina Rules of Appellate Procedure provides:

To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly prohibited by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

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N.C.R. App. P. 2 (2007). Our Supreme Court has stated, Appellate Rule 2 “must be applied cautiously.” *Hart*, 361 N.C. at 315, 644 S.E.2d at 205. “Rule 2 relates to the residual power of the North Carolina appellate courts to consider, *in exceptional circumstances*, significant issues of importance in the public interest or to prevent injustice which appears manifest to the court and *only in such instances*.” *Id.* at 315-16, 644 S.E.2d at 205 (citations omitted) (emphasis supplied). The decision whether to invoke Appellate Rule 2 is discretionary and is to be limited to “rare” cases in which a fundamental purpose of the appellate rules is at stake. *Id.* Appellate Rule 2 has most consistently been invoked to prevent manifest injustice in criminal cases in which substantial rights of a defendant are affected. *Id.* at 316, 644 S.E.2d at 205 (citing *State v. Sanders*, 312 N.C. 318, 320, 321 S.E.2d 836, 837 (1984)).

Nothing in the record or briefs demonstrates “exceptional circumstances” to suspend or vary the rules in order “to prevent manifest injustice to a party, or to expedite decision in the public interest.” *Id.* (citation omitted). In the exercise our discretion, we decline to ignore defendant’s uncorrected rules violations and to invoke Appellate Rule 2.

IV. Conclusion

Defendant committed numerous violations of the North Carolina Rules of Appellate Procedure. Plaintiff has moved to dismiss defendant’s appeal. After service of plaintiff’s motion, defendant failed to amend or correct its admitted violations and deficiencies described above.

“The North Carolina Rules of Appellate Procedure are mandatory and failure to follow these rules will subject an appeal to dismissal.” *Viar*, 359 N.C. at 401, 610 S.E.2d at 360 (quoting *Steingress*, 350 N.C. at 65, 511 S.E.2d at 299). “[T]he Rules of Appellate Procedure must be consistently applied; otherwise [they] become meaningless.” *Id.* at 402, 610 S.E.2d at 361 (citing *Stansberry*, 164 N.C. at 356, 79 S.E. at 302). In the exercise of our discretionary authority, we decline to invoke Appellate Rule 2. *Hart*, 361 N.C. at 315, 644 S.E.2d at 204-05. Defendant’s appeal is dismissed.

Dismissed.

Judges McGEE and ELMORE concur.

SMITH v. FORSYTH CTY. BD. OF ADJUST.

[186 N.C. App. 651 (2007)]

BRENDA SMITH, PETITIONER v. FORSYTH COUNTY BOARD OF ADJUSTMENT,
RESPONDENT, AND THE NEW HOPE PRESBYTERIAN CHURCH, INTERVENOR

No. COA07-212

(Filed 6 November 2007)

Zoning— adjoining property owner—standing to appeal decision—property damage not alleged

Adjoining property owners must present evidence of a reduction in their property values to establish standing to appeal a zoning officer's decision to the board of adjustment. Petitioner here did not do so.

Appeal by Petitioner from order entered 16 November 2006 by Judge Joseph R. John, Sr., in Forsyth County Superior Court. Heard in the Court of Appeals 18 September 2007.

The Brough Law Firm, by Robert E. Hornik, Jr., for Petitioner-Appellant.

Office of Forsyth County Attorney, by Assistant County Attorney B. Gordon Watkins, III, for Respondent-Appellee Forsyth County.

Paul C. Shepard for Intervenor-Appellee New Hope Presbyterian Church.

ARROWOOD, Judge.

Petitioner Brenda Smith appeals from an order dismissing for lack of standing her petitions for writ of *certiorari* seeking review of a decision of Respondent-Appellee Forsyth County Zoning Board of Adjustment that affirmed certain decisions of the Forsyth County Zoning Officer. We affirm.

The pertinent facts are summarized as follows: Petitioner owns and resides on property located on Harper Road, in the Forsyth County town of Clemmons. Intervenor owns adjoining property on Harper Road. In June 2005, Intervenor applied to the Forsyth County inspections department for a permit to build a church and athletic field. The Forsyth County Uniform Development Ordinance (UDO) distinguishes between neighborhood and community scale churches, with different zoning requirements for each. Under the UDO a neighborhood church is one with a seating capacity of 600 or fewer, and a

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community church is one with a seating capacity of over 600. In July 2005 a Forsyth County Zoning Officer issued Intervenor a building permit for construction of a neighborhood church.

Petitioner appealed to Respondent Forsyth County Zoning Board of Adjustment (the Board). Petitioner's appeal asserted that (1) the Zoning Officer improperly granted Intervenor a permit for a neighborhood church instead of a community church; (2) the Zoning Officer improperly failed to require Intervenor to install a bufferyard around its athletic field; and (3) the Zoning Officer wrongly decided certain issues regarding grading on the church property.

In August 2005 the Board conducted a hearing on Petitioner's appeal. Following the hearing, the Board upheld the Zoning Officer's classification of the church as a neighborhood scale church and his decision that Intervenor was not required to install a bufferyard around its athletic field. The board found that the Zoning Officer had erred in regards to grading requirements on Intervenor's lot.

Prior to the Board's issuance of a formal written decision, Petitioner filed an original and an amended petition for a writ of *certiorari*, seeking review of the Board's decision in Forsyth County Superior Court. After the Board issued its decision, Petitioner refiled her amended petition. The writ was issued on 27 July 2006 by Forsyth County Superior Court Judge Michael E. Helms, and New Hope Church was allowed to intervene in the action. Following a hearing conducted before Superior Court Judge Joseph R. John, Sr., the court on 16 November 2006 entered an order dismissing the writ as improvidently granted, and dismissing Petitioner's appeal for lack of standing. From this order, Petitioner timely appealed.

The dispositive issue is whether Petitioner had standing to pursue her appeal from the Zoning Officer to the Board, and from the Board to Superior Court. The trial court ruled that the record evidence was "inadequate" to show that "Petitioner has suffered or will suffer a reduction in the value of her property as a result of the Zoning Officer's determinations or of the Decision affirming such determinations," and, therefore, that Petitioner failed to show that she "has suffered or will be subject to special damages." On this basis, the court concluded that Petitioner lacked standing as a "person aggrieved" either under N.C. Gen. Stat. § 153A-345(e) (2005), or under 1947 N.C. Sess. Laws ch. 677, § 33 or 34. The court further concluded that, because Petitioner lacked standing, the trial court lacked

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subject matter jurisdiction over the proceeding. Petitioner argues that the trial court erred in concluding that she had not shown standing. We disagree.

“The term [standing] refers to whether a party has a sufficient stake in an otherwise justiciable controversy so as to properly seek adjudication of the matter.” *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 51 (2002), *disc. review denied*, 356 N.C. 675, 577 S.E.2d 628 (2003) (citing *Sierra Club v. Morton*, 405 U.S. 727, 731-32, 31 L. Ed. 2d 636, 641 (1972)). “Standing is a necessary prerequisite to a court’s proper exercise of subject matter jurisdiction[,]” *Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878, *disc. review denied*, 356 N.C. 610, 574 S.E.2d 474 (2002) and “is a question of law which this Court reviews de novo.” *Cook v. Union Cty. Zoning Bd. of Adjust.*, 185 N.C. App. 582, 588, 649 S.E.2d 458, 464 (2007) (citation omitted).

In the instant case, Petitioner appealed (1) from the Zoning Officer to the Board, and (2) from the Board to Superior Court. We first consider her standing to appeal from the Zoning Officer to the Board. Appeals to a county board of adjustment from a zoning decision are governed by N.C. Gen. Stat. § 153A-345(b) (2005), Board of Adjustment, which provides in relevant part that:

- (b) A zoning ordinance or those provisions of a unified development ordinance adopted pursuant to the authority granted in this Part shall provide that the board of adjustment shall hear and decide appeals from and review any order, requirement, decision, or determination made by an administrative official charged with the enforcement of that ordinance. Any person aggrieved or any officer, department, board, or bureau of the county may take an appeal. . . .

(emphasis added). Petitioner appealed as an individual and not as an “officer, department, board, or bureau of the county.” “Thus, petitioner[] had standing only if [she was an] aggrieved person[] within the meaning of the statute.” *Heery v. Zoning Board of Adjustment*, 61 N.C. App. 612, 613, 300 S.E.2d 869, 870 (1983) (applying N.C. Gen. Stat. § 160A-388(e), the parallel statute governing city zoning boards). *Heery* held that standing as a “person aggrieved” requires a showing of “special damages”:

[T]he petitioners failed to allege, and the Superior Court failed to find, that petitioners would be subject to “special damages” dis-

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tinct from the rest of the community. Without a claim of special damages, the petitioners are not “aggrieved” persons under N.C. Gen. Stat. § 160A-388(e), and they have no standing.

Heery, 61 N.C. App. at 614, 300 S.E.2d at 870. This Court has “defined ‘special damage’ as ‘a reduction in the value of his [petitioner’s] own property.’ ” *Id.* at 613, 300 S.E.2d at 870 (quoting *Jackson v. Board of Adjustment*, 275 N.C. 155, 161, 166 S.E.2d 78, 82 (1969)). The same standard applies to appeals under N.C. Gen. Stat. § 153A-345(b).

[A]ny person aggrieved has standing to appeal the decision of a [county] board of adjustment pursuant to N.C. Gen. Stat. § 153A-345(b) [(2005)]. . . . A person aggrieved must show either “some interest in the property affected,” or, if plaintiffs are nearby property owners, they must show special damage which amounts to “a reduction in the value of [their] property.”

Cook, 185 N.C. App. at 590, 649 S.E.2d at 465-66 (quoting *Heery*, 61 N.C. App. at 613, 300 S.E.2d at 870) (internal quotations and citations omitted).

To establish standing to appeal a zoning decision to the Board, “[a]djoining property owners must present evidence of a reduction in their property values.” *County of Lancaster v. Mecklenburg County*, 334 N.C. 496, 504 n.4, 434 S.E.2d 604, 610 n.4 (1993) (citation omitted). Mere proximity to the site of the zoning action at issue is insufficient to establish “special damages”:

[The p]etition alleges only that they are the record land owners of a tract of land located across the highway from Respondent’s property, and are citizens and residents of Durham County, North Carolina. . . . Petitioners’ mere averment that they own land in the immediate vicinity of the property for which the special use permit is sought, absent any allegation of “special damages distinct from the rest of the community” in their Petition, is insufficient to confer standing upon them.

Sarda v. Cty. of Durham Bd. of Adjust., 156 N.C. App. 213, 215, 575 S.E.2d 829, 831 (2003) (quoting *Lloyd v. Town of Chapel Hill*, 127 N.C. App. 347, 351, 489 S.E.2d 898, 900 (1997)).

In the instant case, Petitioner’s application to the Board for appeal of the Zoning Officer’s decisions does not allege that the zoning decisions at issue had decreased the value of her property or would do so in the future. Petitioner failed to allege, or show, special damages; therefore, she did not have standing to appeal from the

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Zoning Officer to the Board. That being so, we have no need to consider Petitioner's standing to appeal from the Board to Superior Court. We conclude that the trial court did not err in its conclusion that Petitioner lacked standing.

Petitioner argues that her standing is not dependent on meeting the statutory requirements of G.S. § 153A-345, and contends that she has standing pursuant to the 1947 enabling legislation granting Forsyth County authority to adopt zoning regulations. In support of her position, Petitioner cites § 34 which states that "any persons . . . aggrieved by any decision of the Board of Adjustment or any taxpayer or any officer, department, board or bureau of the county may present . . . a petition" and argues that she has standing as a "taxpayer." However, § 34 governs appeals to superior court from the county Board, while § 33, which governs appeals to the Board, states in relevant part that:

Appeals to the Board of Adjustment may be taken by any person aggrieved by his inability to obtain a building permit, or by the decision of any administrative officer or agency based upon or made in the course of the administration or enforcement of the provisions of the zoning resolution. . . .

As discussed above, Petitioner did not allege or show the requisite "special damages" to assert standing as a "person aggrieved." Accordingly, she lacked standing to appeal to the Board under either G.S. § 153A-345 or § 33 of the 1947 Act.

For the reasons discussed above, we conclude that the trial court did not err and that its order should be

Affirmed.

Chief Judge MARTIN and Judge STROUD concur.

IN RE B.E.

[186 N.C. App. 656 (2007)]

In the Matter of: B.E.

No. COA06-1522

(Filed 6 November 2007)

1. Appeal and Error— ruling obtained on motion to dismiss— court’s statement

An assignment of error was considered on its merits where a juvenile moved to dismiss an indecent liberties allegation for insufficient evidence, the trial court took the case under advisement, and the court later stated that the statutory requirement for the offense had been met.

2. Indecent Liberties— sufficiency of evidence

The State presented substantial evidence of each element of indecent liberties between children and that this juvenile was the perpetrator, and a motion to dismiss for insufficient evidence was properly granted.

3. Appeal and Error— obtaining ruling on motion—language used in juvenile adjudication form—no prior objection possible

An assignment of error to the standard of proof in an indecent liberties proceeding against a juvenile was preserved where the juvenile appealed from the adjudication. The “clear, cogent, and convincing” language on the AOC adjudication form was not used in open court, so that the juvenile would not have been aware of the error and could not object to it until he received the adjudication.

4. Juveniles— indecent liberties proceeding—standard of proof

The standard of proof in a juvenile indecent liberties proceeding could not be ascertained from the record, and the adjudication was remanded. The AOC preprinted form referred to “clear, cogent, and convincing” evidence, while the trial court referred to reasonable doubt in a passing comment. The trial court must unequivocally state the standard of proof.

Appeal by juvenile from adjudication order entered 26 April 2006 by Judge Herbert L. Richardson and disposition order entered 19 June 2006 by Judge W. Jeffrey Moore in District Court, Robeson County. Heard in the Court of Appeals 7 June 2007.

IN RE B.E.

[186 N.C. App. 656 (2007)]

Attorney General Roy A. Cooper, III, by Assistant Attorney General Chris Z. Sinha, for the State.

Lisa Skinner Lefler for juvenile-appellant.

STROUD, Judge.

Juvenile appeals from order adjudicating him delinquent for committing indecent liberties between children, in violation of N.C. Gen. Stat. § 14-202.2, and the subsequent dispositional order. Because we conclude that the trial court did not unequivocally state that it found the facts underlying the adjudication order to be true beyond a reasonable doubt, we remand.

I. Background

The State's evidence tended to show that juvenile masturbated in front of a seven year-old girl ("the victim") on 15 July 2005. A juvenile petition, alleging that juvenile had taken indecent liberties with the victim, was filed in Robeson County on or about 10 October 2005. The petition was heard on 6 and 18 April 2006. Juvenile was adjudicated delinquent in Robeson County District Court on 26 April 2006.

On 8 June 2006, the trial court conducted a dispositional hearing, entering a disposition order on 19 June 2006. The disposition order placed juvenile on probation, under the supervision of a court counselor, for up to twelve months, and ordered the juvenile to cooperate with specified programs, including a sex offender evaluation. The trial court also ordered a curfew, restrictions on contact with anyone under age thirteen without adult supervision, intermittent confinement of up to five twenty-four hour periods, and testing for use of drugs or alcohol. From the adjudication and disposition orders, juvenile appeals.

II. Motion to Dismiss

[1] Juvenile first contends that the trial court erred by failing to rule on defense counsel's motions to dismiss for insufficiency of the evidence at the close of the State's evidence and at the close of all the evidence. Alternatively, juvenile contends that even if the trial court properly denied the motion to dismiss, the evidence is insufficient to support an adjudication of delinquency.

We note that failure "to obtain a ruling upon the party's request, objection or motion[.]" ordinarily results in waiver of appellate review of the issue. N.C.R. App. P. 10(b)(1).

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However, the record shows that after juvenile moved to dismiss on 6 April 2006, the trial judge took the case under advisement, and the case reconvened on 18 April 2006. Upon reconvening, juvenile's trial counsel reminded the trial judge of the motion to dismiss. The trial judge then advised counsel regarding several cases he had discovered in his research. The trial judge then stated:

So, therefore, the Court finds in this particular case, that the act of exposing themselves or masturbating in front of a child within six to eight feet for purposes of arousing and satisfying his sexual desire is *sufficient* to meet the statutory requirement of taking indecent liberties with a minor, and the Court will so find.

(Emphasis added.)

We conclude that in making this statement, the trial court denied juvenile's motion to dismiss for insufficiency of the evidence. Therefore, we conclude that juvenile's actual argument is that the trial court erred by failure to *grant* the motion to dismiss. Furthermore, the State did not raise the issue of waiver, and fully contested the issue on its merits. Therefore, we will consider the assignment of error on its merits.

[2] Generally, a juvenile in an adjudication hearing has “[a]ll rights afforded adult offenders[,]” subject to certain exceptions not relevant to the case *sub judice*. N. C. Gen. Stat. § 7B-2405 (2005).

These rights include the right to have the evidence evaluated by the same standards as apply in criminal proceedings against adults. Therefore, in order to withstand a motion to dismiss the charges contained in a juvenile petition, there must be substantial evidence of each of the material elements of the offense charged. The evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference of fact which may be drawn from the evidence.

In re Bass, 77 N.C. App. 110, 115, 334 S.E.2d 779, 782 (1985) (citations and internal quotation marks omitted).

Juvenile's own brief essentially concedes that the State presented sufficient evidence to survive the motion to dismiss. Juvenile argues that “[t]here was no evidence that B.E. did anything sexual, other than the other child's testimony.” However, our Supreme Court has held that “[t]he uncorroborated testimony of the [child] victim is suf-

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ficient to convict under N.C.G.S. § 14-202.1 [taking indecent liberties with children] if the testimony establishes all of the elements of the offense.” *State v. Quarg*, 334 N.C. 92, 100, 431 S.E.2d 1, 5 (1993).

The essential elements of indecent liberties between children relevant to the case *sub judice* are: (1) a perpetrator under age 16, (2) who willfully takes any immoral, improper, or indecent liberties with a child, (3) who is at least three years younger than the perpetrator, (4) for the purpose of arousing or gratifying sexual desire. N.C. Gen. Stat. § 14-202.2(a)(1) (2005).

The State presented evidence that the victim was seven years old, and that the juvenile was fifteen years old when the incident in question took place. This evidence satisfies the first and third elements. The State also presented evidence that B.E. masturbated in front of victim. This evidence satisfies the second and fourth elements. Accordingly, we conclude that the State presented substantial evidence of each element of indecent liberties between children and that juvenile was the perpetrator of the offense. The motion to dismiss was therefore properly denied.

III. Standard of Proof

[3] Juvenile next contends that the trial court erred when it adjudicated him delinquent by clear, cogent and convincing evidence, instead of beyond a reasonable doubt. We agree.

The adjudication order contains the following relevant finding:

The following facts have been proven beyond a reasonable doubt:

1. That on or about July 15, 2005 the juvenile, [B.E.] did unlawfully and willfully commit indecent liberties between children against [the victim], a child who was at least three (3) years younger than the juvenile, being an offense in violation of G.S. 14-202.2, by clear, cogent & convincing evidence.

The underlined portion of the above finding is the pre-printed wording of a standard form Juvenile Adjudication Order (Delinquent), AOC-J-460, New 7/99. The remainder of the finding was typed into a blank on the form.

The State agrees with juvenile’s contention that the proper standard of proof for a juvenile to be adjudicated delinquent is beyond a reasonable doubt. However, the State contends that juvenile essentially waived his right to object to this error by his failure to obtain a

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ruling on his motion to dismiss made on 6 April 2006, when the case reconvened on 18 April 2006.

Alternatively, the State cites *In re Eades*, 143 N.C. App. 712, 713, 547 S.E.2d 146, 148 (2001), to contend that an oral statement of the standard of proof is sufficient, and cites *In re Mitchell*, 87 N.C. App. 164, 166, 359 S.E.2d 809, 811 (1987), to contend that an oral statement of the standard of proof is unnecessary if the standard of proof is included in the written order. The State further argues that the trial judge's statement in response to juvenile's motion to dismiss at the close of the State's evidence ("Well, I'll reserve ruling on that to [sic] at the conclusion of all that. And then we're rehear based on—beyond a reasonable doubt, we'll do at that point."), and a statement by juvenile's trial counsel when he renewed his motion to dismiss at the close of all evidence ("And if in some way you should rule against me, then obviously we would need to come back and I'm going to argue reasonable doubt."), together with the pre-printed words on the standard form, show "undeniably" that the trial court found the facts beyond a reasonable doubt. The State finally argues that the foregoing shows that the words "clear, cogent and convincing evidence," which were included on the adjudication order after the correct standard of "beyond a reasonable doubt" was a "pure administrative error," which should be ignored by this Court as mere surplusage.

We first reject the State's contention that juvenile failed to preserve his assignment of error regarding the standard of proof for review. Certainly, as noted by the State, the trial judge never stated in open court that he would use clear, cogent and convincing evidence as a standard of proof. Therefore, juvenile would have been unaware of this error and unable to object until he received the completed adjudication order, from which he duly appealed.

[4] We also reject the State's contention that the ambiguity in the adjudication order is a "pure administrative error." One of our basic constitutional rights is that the State prove all elements of a criminal charge, including an juvenile delinquency petition, beyond a reasonable doubt. *In re Vinson*, 298 N.C. 640, 657, 260 S.E.2d 591, 602 (1979). This constitutional right is codified in the North Carolina Juvenile Code, which provides that "[t]he allegations of a petition alleging the juvenile is delinquent shall be proved beyond a reasonable doubt." N.C. Gen. Stat. § 7B-2409 (2005). Further, "[i]f the court finds that the allegations in the petition have been proved as provided in G.S. 7B-2409, the court *shall* so state." N.C. Gen. Stat. § 7B-2411

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(2005) (emphasis added). Accordingly, this Court has previously held that the provisions of N.C. Gen. Stat. § 7B-2411 “are mandatory and that it is reversible error for a trial court to fail to state affirmatively that an adjudication of delinquency is based upon proof beyond a reasonable doubt.” *In re Walker*, 83 N.C. App. 46, 47, 348 S.E.2d 823, 824 (1986).

The trial court’s standard of proof in a juvenile delinquency proceeding must be reflected in the record, either orally or in writing. *In re Rikard*, 161 N.C. App. 150, 154, 587 S.E.2d 467, 469 (2003). While the trial court may choose whether to state its standard of proof either orally or in writing, protection of a “fundamental constitutional right should not be lightly inferred from fragments of a long and sometimes ambiguous record.” *State v. Love*, 131 N.C. App. 350, 364, 507 S.E.2d 577, 586 (1998), *aff’d per curiam*, 350 N.C. 586, 516 S.E.2d 382, *cert. denied*, 528 U.S. 944, 145 L. Ed. 2d 280 (1999).

In the case *sub judice*, the State is asking us to infer from an ambiguous record that the trial court found that the allegations of the petition had been proved beyond a reasonable doubt. However, we are not able to ascertain the standard of proof from the record. The trial court’s passing comment quoted above is simply not adequate to show that the adjudication of delinquency was based upon proof beyond a reasonable doubt. Nor is the trial court’s adjudication order, which found “beyond a reasonable doubt [that defendant violated] G.S. 14-202.2, by clear, cogent & convincing evidence.”

Furthermore, there was substantial conflicting evidence regarding the allegations against juvenile. It is apparent from the trial judge’s comments during the hearing and his taking the case under advisement to consider it more carefully that he could have had some “reasonable doubt” regarding juvenile’s guilt.

Finally, we find an elementary principle of contract interpretation instructive in this case. “When a contract is partly written or type-written and partly printed any conflict between the printed portion and the [type] written portion will be resolved in favor of the latter.” *National Heater Co., Inc. v. Corrigan Co. Mech. Con., Inc.*, 482 F.2d 87, 89 (8th Cir. 1973). The words on the order which indicate that the State has *failed* to satisfy the required standard of proof, would be, according to the elementary principles of contract law, controlling as to the document.

The trial court must unequivocally state the standard of proof in its order pursuant to N.C. Gen. Stat. § 7B-2411 (2005). Because the

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adjudication order contains an ambiguity which this Court cannot resolve, we conclude that the trial court erred.

Because the trial court has already made its determinations as to the credibility of the witnesses and has weighed the evidence, we do not require a new hearing. Rather, we remand to the trial court for clarification of the standard of proof used in the adjudication order. *See Minter v. Minter*, 111 N.C. App. 321, 329, 432 S.E.2d 720, 726, *disc. review denied*, 335 N.C. 176, 438 S.E.2d 201 (1993).

If the trial court did find that the facts underlying the adjudication were proved beyond a reasonable doubt, it must enter an amended order so stating. If the trial court did not find that these facts were proved beyond a reasonable doubt, the trial court must dismiss the petition with prejudice and vacate the disposition order based thereupon. N.C. Gen. Stat. § 7B-2411.

REMANDED.

Judges ELMORE and STEELMAN concur.

MELVIN CHARLES STRUM, A/K/A CHUCK STRUM, AN INDIVIDUAL AND MARTIN KIMSEY AND VICTORIA KIMSEY, INDIVIDUALS, D/B/A REMAX IN THE MOUNTAINS V. GREENVILLE TIMBERLINE, LLC, D/B/A TIMBERLINE LAND COMPANY OF GREENVILLE, NC LLC

No. COA06-1660

(Filed 6 November 2007)

1. Jury—verdict—inconsistencies—surplusage

The trial court did not abuse its discretion by denying plaintiffs' motion for a new trial based on the jury's failure to follow the judge's instructions where the jury had been instructed that plaintiffs could not recover for both breach of contract and implied contract and the jury answered issues as to implied contract even though it found that there was an express contract. The inconsistent answers were disregarded as surplusage; moreover, there was no inconsistency in the actual verdict in that each of those issues was answered for defendant and it was clear from the face of the verdict that the jury believed that plaintiffs should not prevail.

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2. Real Property— action for commission—authority to sign agreement

The evidence was sufficient to support a jury verdict for defendant in an action to collect a real estate commission where there was competent evidence that the person who signed the Buyer Agency Agreement did not have the authority to bind defendant and defendant's name did not appear on the document.

Appeal by plaintiffs from judgment entered 31 October 2005 and orders entered 3 January 2006 by Judge James U. Downs in Macon County Superior Court. Heard in the Court of Appeals 23 August 2007.

David A. Sawyer, for plaintiffs-appellants.

Ridenour, Lay & Earwood, P.L.L.C., by Eric Ridenour and J. Hunter Murphy, for defendant-appellee.

STEELMAN, Judge.

The trial court did not abuse its discretion in denying plaintiffs' motion for new trial or to alter or amend the verdict where the jury's failure to follow the court's instructions did not render the verdict improper, and where there was competent evidence to support the verdict.

I. Factual Background

Plaintiff Melvin Charles "Chuck" Strum ("Strum") is a realtor associated with ReMax in the Mountains ("ReMax"), a real estate company in western North Carolina owned by plaintiffs Marty and Vickie Kinsey. On 4 December 2002, Strum and ReMax entered into a Buyer Agency Agreement ("Agreement") with Steve Lewis ("Lewis"). The Agreement was signed by Lewis individually with no reference to Timberline Land Company of Greenville, N.C., L.L.C. ("defendant"). It related to 615 acres of land located in Carteret County, North Carolina owned by Weyerhaeuser Company Foundation ("Weyerhaeuser"). At the time that the Agreement was signed, Lewis was a Vice-President of defendant. The services to be performed by Strum and ReMax under the terms of the Agreement included negotiating a reduction in Weyerhaeuser's asking purchase price of \$3.6 million for the property. Plaintiffs were to receive a 5% commission based on the final purchase price. Approximately three months after the Agreement was signed, Strum negotiated a reduction in the purchase price from \$3.6 million to \$2.1 million. On 5 May 2003 an agree-

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ment was entered into between defendant and Weyerhaeuser to purchase the 615 acres for \$2.1 million. No commission was paid by defendant arising out of this transaction, which was consummated on 25 July 2003.

On 25 August 2004, plaintiffs filed a complaint in the Superior Court of Macon County seeking to recover a commission of \$105,000.00 from defendant. The case was heard 19 through 21 October 2005 before Superior Court Judge James U. Downs and a jury. On 21 October 2005 the jury returned a verdict in favor of defendant.

On 8 November 2005, plaintiffs filed a motion for a new trial or to alter or amend the judgment. This motion was heard on 28 November 2005. On 3 January 2006, the trial court denied the motion. Plaintiffs appeal.

II. Denial of Motion for New Trial or To Alter or
Amend the Judgment

[1] Plaintiffs contend that the trial court erred in denying their motion for a new trial or to alter or amend the judgment under Rule 59(a)(5) or (7) of the North Carolina Rules of Civil Procedure. We disagree.

N.C. Gen. Stat. § 1A-1, Rule 59 (2005) states, in part:

New Trials; amendment of judgments.

(a) *Grounds*.—A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds:

...

(5) Manifest disregard by the jury of the instructions of the court;

...

(7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law[.]

The decision to grant a new trial pursuant to a Rule 59(a) motion is within the discretion of the trial court. *Young v. Lica*, 156 N.C. App. 301, 304, 576 S.E.2d 421, 423 (2003) (citation omitted). The court's decision will not be disturbed unless it is:

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[M]anifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision. A trial judge's decision only amounts to an abuse of discretion if there is no rational basis for it.

State v. Mutakbbic, 317 N.C. 264, 274, 345 S.E.2d 154, 158-59 (1986) (internal citations omitted) (internal quotes omitted).

A. Manifest Disregard of Jury Instructions

Plaintiffs first argue that the jury disregarded the instructions of the court, that the verdict on its face reflects this disregard, and that they are entitled to a new trial under Rule 59(a)(5).

"It is well settled that a verdict should be liberally and favorably construed with a view of sustaining it, if possible. . ." *Guy v. Gould*, 202 N.C. 727, 729, 164 S.E. 120, 121 (1932) (citation omitted). Courts have held that where a jury's answers to issues are "are so contradictory as to invalidate the judgment, the practice of the Court is to grant a new trial . . . because of the evident confusion." *Palmer v. Jennette*, 227 N.C. 377, 379, 42 S.E.2d 345, 347 (1947) (citations omitted).

In the instant case, eight issues were submitted to the jury:

1. Did the Plaintiffs and Steve Lewis enter into a real estate agency contract regarding the purchase of a tract of land in Carteret County known as Weyerheuser [sic] Carteret Number 15?

If you answered Issue One "Yes" then proceed to Issue Two. If you answer Issue One "No" then move to Issue Five.

2. Was Steve Lewis at and in respect of that time authorized to act and contract on behalf of the Defendants?

If you answer Issue Two "No" then do not answer Issue Three.

3. Did the Defendants breach the contract with the Plaintiffs?
4. What amount of damages are the Plaintiffs entitled to recover from the Defendants?
5. Did the Plaintiffs render services as real estate agents for Steve Lewis under such circumstances that the said Steve Lewis should be required to pay for them?
6. Was Steve Lewis at and in respect of time authorized to receive and engage the Plaintiffs' services on behalf of the Defendants?

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7. If the answer to Issue Number Six is no, did the Defendants ratify the agreement to pay for the Plaintiffs' services entered into by Plaintiffs and Steve Lewis?
8. What amount of damages are the Plaintiffs entitled to recover from Defendants?

The court instructed the jury that the first four issues pertained to plaintiffs' claim for breach of contract, and that the second four issues dealt with plaintiffs' claims for implied contract, and that plaintiffs could not recover under both theories. The jury was instructed that if it answered the first four issues in favor of the plaintiff, they should not consider issues five through eight. The jury was further instructed that if it answered the first issue "no," then it should skip issues two through four and proceed to issue five. Finally, the court instructed the jury that a negative answer to issue two ended the lawsuit and the jury was not to consider the remaining issues.

The jury answered the first issue "yes" and the second issue "no." The jury then proceeded to answer issues five through eight as follows:

Issue Five: Yes.

Issue Six: No.

Issue Seven: No.

Issue Eight: \$0.

Although the trial court noted the inconsistency in the jury's verdict, it treated the answers to issues five through eight as surplusage.

We hold that the answers to issues five through eight were mere surplusage. After answering issue two "no," the lawsuit was over. *See Nicholson v. Dean*, 267 N.C. 375, 378, 148 S.E.2d 247, 250 (1966) (finding the legal effect of a jury's answer to the first issue determinative).

We note that even though the jury ignored the judge's instructions in answering issues five through eight, the verdict was consistent; each of the six issues that was answered by the jury was answered in favor of defendant. It is clear from the verdict on its face that the jury believed that plaintiffs should not prevail. The trial court did not abuse its discretion in denying plaintiffs' motion for a new trial due to the jury's disregard of the court's instructions.

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B. Insufficiency of the Evidence to Justify the Verdict

[2] Plaintiffs further argue that the jury verdict is contrary to the greater weight of the evidence, and that they are entitled to a new trial pursuant to Civil Procedure Rule 59(a)(7).

Rule 59(a)(7) permits a new trial to be granted for “[i]nsufficiency of the evidence to justify the verdict.” The term “insufficiency of the evidence” means that the verdict is against the greater weight of the evidence. *In re Will of Buck*, 350 N.C. 621, 624, 516 S.E.2d 858, 860 (1999) (citation omitted). “It is the jury’s function to weigh the evidence and to determine the credibility of witnesses,” *Anderson v. Hollifield*, 345 N.C. 480, 483, 480 S.E.2d 661, 664 (1997), and the trial court should set aside a jury verdict only in “those exceptional situations where the verdict . . . will result in a miscarriage of justice.” *Buck*, 350 N.C. at 628, 516 S.E.2d at 862. Appellate review of a court’s granting or denying a motion for a new trial is limited to whether the record demonstrates an abuse of discretion by the court. *Id.* at 625, 516 S.E.2d at 861. (citation omitted).

The record reveals that competent evidence was presented at trial to support the jury’s finding that Lewis was not an agent of defendant. Lewis individually executed the Agreement, without any reference to any representative capacity. Defendant’s name does not appear on the document. One of defendant’s officers, Auddie “Cliff” Brown, testified that Lewis lacked the requisite authority to bind defendant to the Agreement.

The trial court did not abuse its discretion in denying plaintiffs’ motion for a new trial or to alter or amend the judgment. This argument is without merit.

AFFIRMED.

Judges ELMORE and STROUD concur.

MINEOLA CMTY. BANK v. EVERSON

[186 N.C. App. 668 (2007)]

MINEOLA COMMUNITY BANK, S.S.B. v. DAVID EVERSON, AND PATRICIA EVERSON

No. COA07-133

(Filed 6 November 2007)

**1. Appeal and Error— judicial notice by Court of Appeals—
appeal in another state**

Judicial notice was taken by the Court of Appeals of defendants' appeal of an underlying judgment through the Texas courts.

**2. Jurisdiction— subject matter—foreign judgment—pending
appeal**

The trial court did not lack subject matter jurisdiction in an action to enforce a foreign judgment where an appeal of that judgment was pending. Assuming that defendants invoked the correct statute, they did not assert the pendency of the Texas appeal and the record is silent as to any bond being posted.

3. Judgments— foreign jurisdiction—pending appeal

Defendants cited no statutory or common-law authority for the claim that full faith and credit should not be accorded to a judgment where the underlying case is pending appeal in the foreign jurisdiction. It was defendants' responsibility to seek a stay of the North Carolina proceedings in the trial court pursuant to N.C.G.S. § 1C-1705(a)(2).

4. Appeal and Error— pro se litigant—sanctions

Sanctions were imposed against pro se litigants who castigated plaintiff's counsel in an attempt to conceal their own deficient pleadings and defense and who asserted that the judge committed fraud or was not impartial. The fact that a judge has ruled against a party does not constitute a basis for asserting fraud or impartiality. Taken together, defendants' violations are egregious and transcend the tolerance level ordinarily reserved for pro se litigants. N.C. R. App. P. 34(b)(2)(a).

Appeal by defendants from judgment entered 6 October 2006 by Judge Richard L. Doughton in Rockingham County Superior Court. Heard in the Court of Appeals 20 September 2007.

Wyatt Early Harris Wheeler, LLP, by Jason M. Goins, for plaintiff-appellee.

Patricia M. Everson, David K. Everson, pro se, defendants-appellants.

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[186 N.C. App. 668 (2007)]

STEELMAN, Judge.

Where defendants failed to seek a stay of proceedings to domesticate a foreign judgment based upon the pendency of an appeal in that jurisdiction, the trial court did not err in giving full faith and credit to the Texas judgment. The courts of North Carolina will not tolerate vicious and spurious attacks on the integrity of opposing counsel and the trial judge.

On 11 July 2006, Mineola Community Bank (plaintiff) filed a notice of filing of a foreign judgment against David and Patricia Everson (defendants) in the Superior Court of Rockingham County. The Upshur County, Texas judgment, dated 22 June 2005, accompanied the notice. Defendants filed a Response and Motion to Dismiss on 2 August 2006, asserting ambiguity in plaintiff's notice and challenging the jurisdiction of the North Carolina courts. The matter was set for hearing on 22 September 2006.

Defendants failed to appear. The trial court entered an order finding that the Texas judgment was entitled to full faith and credit pursuant to N.C. Gen. Stat. § 1C-1700 *et seq.* and granting plaintiff's motion to enforce the judgment. Defendants appeal.

Judicial Notice of Texas Proceedings

[1] Defendants' appeal of the underlying judgment through the Texas courts, unmentioned in their responsive pleadings but referenced in their brief, is necessary background to the appeal in this matter. We therefore take judicial notice of the Texas appellate proceedings. The judgment from which appeal was taken was entered on 22 June 2005. On 31 January 2007, the Twelfth Court of Appeals of Texas issued a memorandum opinion in which it affirmed the decision of the trial court. On 14 March 2007, defendants filed a petition for review by the Supreme Court of Texas, which dismissed the petition on 1 June 2007. On 3 July 2007, the mandate of the Twelfth Court of Appeals of Texas issued.

Jurisdiction

[2] In their first argument, defendants contend that the trial court lacked subject matter jurisdiction because there was a pending appeal in the Texas courts of the judgment sought to be enforced. We disagree.

Defendants erroneously cite to N.C.G.S. § 1C-1800 *et seq.*, the North Carolina Foreign Money Judgments Recognition Act, which

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governs judgments of “governmental unit[s] *other than* the United States, any state,” or U.S. territory. N.C.G.S. § 1C-1801 (2005) (emphasis added). By arguing an incorrect statute, defendants have failed to present authority in support of this assignment of error and it is dismissed pursuant to N.C. R. App. P. 28(b)(6) (2007).

The controlling statute is N.C.G.S. § 1C-1700 *et seq.*, governing recognition of judgments of federal and state courts that are “entitled to full faith and credit in this State.” N.C.G.S. § 1C-1702 (2005). Assuming *arguendo* that the defendants had cited and argued the correct statute, their argument nonetheless fails because the defendants failed to comply with the terms of the statute, which provides a procedure for seeking a stay of the North Carolina proceedings when the foreign judgment has been appealed.

The judgment debtor may file a motion for relief from . . . the foreign judgment on the grounds that the foreign judgment has been appealed from, or enforcement has been stayed by, the court which rendered it, or on any other ground for which relief from a judgment of this State would be allowed. . . . [T]he court shall stay enforcement of the foreign judgment for an appropriate period *if the judgment debtor shows* that:

- (1) The foreign judgment has been stayed by the court that rendered it; or
- (2) An appeal from the foreign judgment is pending . . . and the judgment debtor executes a written undertaking in the same manner and amount as would be required in the case of a judgment entered by a court of this State under G.S. 1-289.

N.C.G.S. § 1C-1705(a) (2005) (emphasis added). Thus, the proceedings in North Carolina to enforce the judgment will be stayed upon a showing by the judgment debtor that the foreign court has stayed the judgment, or that an appeal is pending in the foreign jurisdiction and defendants have posted a bond in North Carolina. In this case, defendants did not assert the pendency of the Texas appeal before the North Carolina court, and the record is silent as to any bond being posted.

[3] In their second argument, defendants contend that: (1) the pending appeal in the Texas courts precluded application of the “full faith and credit” doctrine; (2) the trial court erred in entering an order before defendants’ appeal in the Texas courts was resolved; and (3) the failure of plaintiff’s counsel to disclose the pending appeal was

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intended to “perpetrate a fraud on the court, subvert the trial process, and/or disrupt the court’s functioning.” We disagree.

Defendants cite no statutory or common-law authority for their claim that full faith and credit should not be accorded to a judgment where the underlying case is pending appeal in the foreign jurisdiction. Failure to cite authority is a violation of N.C. R. App. P. 28(b)(6) and subjects this argument to dismissal. *See State v. Cummings*, 361 N.C. 438, 479, 648 S.E.2d 788, 812-13 (2007); *Atchley Grading Co. v. W. Cabarrus Church*, 148 N.C. App. 211, 212-13, 557 S.E.2d 188, 189 (2001).

As noted above, it was defendants’ responsibility to seek a stay of the North Carolina proceedings in the trial court pursuant to N.C.G.S. § 1C-1705(a)(2). We decline to allow defendants to use spurious and frivolous attacks upon the integrity of opposing counsel and the trial court as a smokescreen for their failure to seek a stay. This assignment of error is totally without merit.

Sanctions

[4] Rule 34 of the North Carolina Rules of Appellate Procedure authorizes this Court to impose sanctions against a party when we determine that an appeal is frivolous because:

(3) a petition, motion, brief, record, or other paper filed in the appeal was so grossly lacking in the requirements of propriety, grossly violated appellate court rules, or grossly disregarded the requirements of a fair presentation of the issues to the appellate court.

N.C. R. App. P. 34(a)(3) (2007). We hold that defendants have violated this provision in two respects. In making this ruling, we have considered defendants’ *pro se* status, but find their conduct too egregious to overlook.

First, defendants, in their brief, roundly castigate plaintiff’s counsel for not disclosing to the trial court the pendency of their appeal of the original Texas judgment. As noted above, it was incumbent upon the defendants to present to the court the fact that an appeal was pending and seek a stay. This they did not do. Instead, defendants have engaged in a deliberate and unwarranted attack upon the personal integrity of plaintiff’s counsel in an attempt to conceal their own deficient pleadings and defense of this matter. We hold that these accusations are “grossly lacking in the requirements of propriety” and

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subject defendants to sanctions under N.C. R. App. P. 34(a)(3). Such conduct will not be tolerated in the appellate courts of this State.

Second, in the record on appeal, one of defendant's assignments of error states:

Judge Doughton committed fraud on the court by failing to uphold the doctrine of stare decisis and Rule of Law thereby failing to perform his judicial functions impartially.

The fact that a judge of the trial division of this State has ruled against a party does not constitute any basis for asserting that the judge committed fraud or was not impartial. The total frivolity of this assignment of error is shown by the fact that defendants failed to argue the matter on brief. We hold that this assignment is "grossly lacking in the requirements of propriety" and subjects defendants to sanctions under N.C. R. App. P. 34(a)(3). Such spurious allegations concerning the integrity of our trial bench will not be tolerated. *See State v. Rollins*, 131 N.C. App. 601, 607-08, 508 S.E.2d 554, 558-59 (1998).

Defendants' conduct, as set forth above, violates the provisions of Rule 34(a)(3). Alone, either of these violations might be overlooked. Taken together, they are egregious and transcend the tolerance level ordinarily reserved for *pro se* litigants. Consequently, in our discretion and pursuant to N.C. R. App. P. 34(b)(2)(a), we impose double costs upon defendants.

Defendants' brief addresses two of four original assignments of error. Pursuant to N.C. R. App. P. 28(b)(6) (2007), the remaining assignments of error are deemed to be abandoned.

AFFIRMED. DOUBLE COSTS ASSESSED AGAINST DEFENDANTS.

Judges BRYANT and GEER concur.

STATE v. JOHNSON

[186 N.C. App. 673 (2007)]

STATE OF NORTH CAROLINA v. KENNETH RICHARD JOHNSON, DEFENDANT

No. COA06-1552

(Filed 6 November 2007)

1. Constitutional Law— separation of powers—habitual DWI statute—prosecutorial discretion

Defendant's argument that the habitual DWI statute violates separation of powers, based on prosecutorial discretion, has been rejected in a case involving the Habitual Felon Act. Defendant neither argued nor does the evidence reflect an improper motive by the prosecutor.

2. Search and Seizure— traffic stop—improper tags sufficient

Improper license tags provided sufficient cause to stop defendant, and the trial court did not err by denying defendant's motion to suppress the resulting evidence of driving while impaired.

3. Witnesses— lay opinion—intoxication of another

A lay person may testify that a person is impaired, in his or her opinion, if that opinion is based on personal observation. The trial court did not err in a driving while impaired prosecution by allowing a deputy to testify that defendant was impaired where there was no dispute that the deputy personally observed defendant and that she based her opinion on those observations.

4. Motor Vehicles— driving while impaired—sufficiency of evidence

There was sufficient evidence of driving while impaired to go to the jury where defendant failed the field sobriety tests, his eyes were bloodshot and his speech slurred, there was an empty can of beer in his car and he admitted to having had four beers, and he refused to take an intoxilyzer test.

Appeal by defendant from judgment entered 22 June 2006 by Judge David S. Cayer in Guilford County Superior Court. Heard in the Court of Appeals 7 June 2007.

Attorney General Roy Cooper, by Special Counsel Isaac T. Avery, III, for the State.

Daniel F. Read, for defendant.

STATE v. JOHNSON

[186 N.C. App. 673 (2007)]

ELMORE, Judge.

On 14 November 2004, Deputy Stacey Jarrell of the Guilford County Sheriff's Department noticed a red Ford Mustang parked diagonally. Kenneth Richard Johnson (defendant) "entered the vehicle, he put the car in reverse; he backed up a little bit; he put it in park; he went forward a little bit; then he put it in reverse again; backed up a little bit, and then put it in park and drove away." Deputy Jarrell testified that "[t]here was nothing obstructing the vehicle" that would necessitate such maneuvers. Deputy Jarrell noticed that the Mustang had Ohio license tags; she ran the tags and discovered that the license was registered to a Chevrolet, not a Ford. Accordingly, she stopped defendant and requested his license and registration. Defendant stated that his license was suspended. He produced a title that, despite having been signed over thirty days earlier, had not been filed with the Department of Motor Vehicles.

Deputy Jarrell smelled a moderate odor of alcohol and observed that defendant's eyes were bloodshot and that his speech was slurred. She also noticed that there was an empty beer can in the car. Responding to the deputy's questions, defendant stated that he had consumed four beers and provided a false name.

Because Deputy Jarrell was still in training, another deputy came to administer standardized field sobriety tests to defendant. Defendant was not able to stand on one foot past a count of seven and required the use of his arms for balance. He also was unable to successfully complete the walk and turn test; he swayed when he walked, could not walk heel to toe, stepped off the line, and had to use his hands for balance. Based on her observations, Deputy Jarrell formed the opinion that defendant was appreciably impaired by alcohol and placed him under arrest. Deputy Jarrell then brought defendant to High Point. Defendant was read his rights regarding an Intoxilyzer test, which he refused to take.

Defendant was indicted for habitual Driving While Impaired (DWI), giving false information to an officer, Driving While License Revoked (DWLR), and improper license plate.¹ A jury found defendant guilty of habitual DWI, and judgment was entered against defendant. It is from this judgment that he now appeals.

[1] Defendant first claims that the habitual DWI statute "violates the separation of powers between the branches of government and

1. The trial court subsequently dismissed all of the charges but the habitual DWI.

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[186 N.C. App. 673 (2007)]

is an unconstitutional delegation of legislative authority to the executive branch.” He appears to rest this contention on the fact that the District Attorney is allowed to exercise discretion in enforcing the law. Thus, as the State succinctly phrases it, defendant’s argument appears to be “one about prosecutorial discretion.”

This Court has recently rejected an almost identical argument regarding the Habitual Felon Act. *See State v. Wilson*, 139 N.C. App. 544, 550-51, 533 S.E.2d 865, 869-70 (2000) (addressing N.C. Gen. Stat. §§ 14-7.1 *et seq.* (2000)). In that case, we stated;

It is well established that there may be selectivity in prosecutions and that the exercise of this prosecutorial prerogative does not reach constitutional proportion unless there be a showing that the selection was deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification.

Id. at 550, 533 S.E.2d at 870 (quotations and citations omitted).

In this case, as in *Wilson*, “[u]pon careful review of the record, we hold defendant has neither argued nor does any evidence reflect an improper motive by the prosecutor *sub judice* in the decision regarding the charges upon which defendant was indicted and tried.” *Id.* at 551, 533 S.E.2d at 870. Accordingly, defendant’s first argument is without merit.

[2] Defendant next suggests that the trial court erred in denying his motion to suppress based on his claim that there was insufficient cause or suspicion to stop his car. Though defendant notes that the trial court denied his motion based on the presence of the fictitious tag, which he does not dispute, he nevertheless pursues an argument that the stop was made without sufficient cause. This argument is untenable and entirely lacking in reason. The improper tags, standing alone, gave the deputies sufficient cause to stop defendant. *See, e.g., State v. Gray*, 55 N.C. App. 568, 571, 286 S.E.2d 357, 360 (1982) (holding that expired temporary tags were sufficient cause to justify a stop). This argument is completely without merit.

[3] Next, defendant claims that the trial court erred in allowing Deputy Jarrell to testify as to her opinion that defendant was impaired. This, too, is incorrect. “[A] lay person may give his opinion as to whether a person is intoxicated so long as that opinion is based on the witness’s personal observation.” *State v. Streckfuss*, 171 N.C. App. 81, 89, 614 S.E.2d 323, 328 (2005) (quoting *State v. Rich*, 351 N.C. 386, 398, 527 S.E.2d 299, 306 (2000)) (alteration in original). There is

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[186 N.C. App. 676 (2007)]

no dispute that Deputy Jarrell personally observed defendant and that she based her opinion on those observations. Defendant's contention has no merit.

[4] Finally, defendant suggests that the trial court erred in denying his motion to dismiss for insufficient evidence. Though he represents to this Court that there was nothing to suggest that he was driving under the influence of alcohol except a license plate and bad parking, the record paints a much different picture. Defendant failed the field sobriety tests. His eyes were bloodshot and his speech slurred. There was an empty can of beer in his vehicle and defendant admitted to having had four beers. Defendant refused to take an Intoxilyzer test. All of these facts, viewed in the light most favorable to the State, support sending this case to the jury. Having conducted a thorough review of the record and briefs, we can discern no error in defendant's trial.

No error.

Judges STEELMAN and STROUD concur.

STATE OF NORTH CAROLINA v. DUJUAN WILLIAMS ROGERS

No. COA07-309

(Filed 6 November 2007)

Sentencing— sale and delivery of drugs—single transfer

A conviction for both sale and delivery of cocaine and marijuana arising from a single sale of each was remanded for resentencing for sale or delivery of each substance.

Appeal by defendant from judgments entered 18 August 2006 by Judge Charles H. Henry in Onslow County Superior Court. Heard in the Court of Appeals 17 September 2007.

Attorney General Roy Cooper, by Associate Attorney General LaToya B. Powell, for the State.

Sue Genrich Berry, for defendant-appellant.

STATE v. ROGERS

[186 N.C. App. 676 (2007)]

ELMORE, Judge.

Dujuan Williams Rogers (defendant) was charged by three indictments with (1) possession with intent to sell and deliver cocaine, sale of cocaine, and delivery of cocaine; (2) possession with intent to sell and deliver marijuana, sale of marijuana, and delivery of marijuana; and (3) felony conspiracy and maintaining a dwelling for the keeping and selling of controlled substances.

The State presented evidence tending to show that on 18 February 2005, officers of the Onslow County Sheriff's Department supplied a confidential informant with \$215.00 in cash for the purpose of purchasing cocaine and marijuana from defendant. The informant traveled to a mobile home, entered the residence, and handed defendant the money. Defendant showed the informant two substances, weighed them, and handed them to her. The informant delivered the substances to the officers. Subsequent chemical analysis of the substances revealed them to be 3.6 grams of cocaine hydrochloride and 13.4 grams of marijuana.

At the conclusion of the State's evidence, the trial court dismissed the charges of felony conspiracy and maintaining a dwelling for the keeping and selling of controlled substances.

Defendant testified that he acted as a go-between for a man named "Angel," who supplied him with the substances that he gave to the confidential informant.

The jury found defendant guilty of all six of the remaining charges. The trial court consolidated all of the counts pertaining to cocaine and imposed an active sentence within the presumptive range of a minimum term of thirteen months and a maximum term of sixteen months. The trial court consolidated all of the counts pertaining to marijuana and imposed a suspended sentence of a minimum term of eight months and a maximum term of ten months.

Defendant contends that the trial court erred by sentencing him for both sale and delivery of each substance. In *State v. Moore*, 327 N.C. 378, 382, 395 S.E.2d 124, 127 (1990), the defendant was convicted of three offenses arising out of a single transfer of a controlled substance: possession with intent to sell or deliver the substance, sale of the substance, and delivery of the substance. Our Supreme Court held that a defendant may not "be convicted under N.C.G.S. § 90-95(a)(1) of both the sale and the delivery of a controlled substance arising from a single transfer." *Id.* The Court directed that the judgments

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[186 N.C. App. 676 (2007)]

“should be amended to reflect that the defendant was convicted on each indictment of a single count for the ‘sale or delivery of a controlled substance.’” *Id.* at 383, 395 S.E.2d at 128. The Court also stated that “[b]ecause the three convictions on each indictment were consolidated into one judgment per indictment, and because of the lengths of the prison terms imposed, we are unable to determine what weight, if any, the trial court gave each of the separate convictions for sale and for delivery in calculating the sentences imposed upon the defendant. This case must thus be remanded for resentencing.” *Id.* at 383, 395 S.E.2d at 127-28.

The State concedes that the trial court committed error by sentencing defendant for both sale and delivery arising out of a single transfer, but argues that remand for resentencing is not required. It argues that although resentencing may have been required in *Moore*, which arose under the Fair Sentencing Act, the judgments in the present case may be corrected simply by vacating defendant’s delivery convictions. The State reasons that delivery is a lesser crime than sale of a controlled substance or possession with intent to sell or deliver a controlled substance. However, until our Supreme Court overrules or creates an exception to the requirement of resentencing it imposed in *Moore*, we are bound to follow that course until otherwise directed by that Court. *Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985).

In accordance with *Moore*, the matter is remanded to the trial court for resentencing upon convictions of sale or delivery of cocaine and sale or delivery of marijuana.

Remanded for resentencing.

Judges WYNN and BRYANT concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 6 NOVEMBER 2007

BAKER v. GRAYSTONE CONSTR. No. 06-1628	Indus. Comm. (I.C. 405357)	Affirmed
BROWN v. ROBBINS No. 07-77	Surry (06CVS471)	Affirmed
ETTER v. PIGG No. 07-92	Henderson (01SP287)	Affirmed
GRINER v. GRINER No. 06-1579	New Hanover (06CVD2342)	Affirmed
HOSPICE AT GREENSBORO, INC. v. N.C. DEP'T OF HEALTH & HUMAN SERVS. No. 06-1641	Dep't of Health & Human Servs. (05DHR1392)	Affirmed
HUGUELY v. MRAZ No. 07-295	Currituck (03CVS161)	Affirmed
IN RE D.L.W. No. 06-1715	Wake (04JT487)	Affirmed and remanded with instructions
IN RE H.H. No. 07-292	Wake (06J66)	Affirmed
IN RE J.G., D.B. No. 07-674	Wake (05JT625)	Affirmed
IN RE K.J.H. No. 07-283	Guilford (05J149)	Affirmed in part, vacated in part and remanded
IN RE M.C., A.W., A.W., M.C., G.W. No. 07-746	New Hanover (06J324-26) (06J415-16)	Affirmed in part; remanded in part
IN RE R.C.H. & B.R.H. No. 07-621	Burke (04J200-01)	Affirmed
IN RE S.M.S., P.J.S. No. 07-619	Mecklenburg (06JT447-48)	Affirmed
INTERLOCAL RISK FIN. FUND OF N.C. v. RYALS No. 06-1607	Wake (05CVS14303)	Affirmed
OAKES v. LINCOLN CTY. BD. OF ELECTIONS No. 06-1699	Lincoln (06CVS838)	Affirmed

ROBERTSON v. ROBERTSON No. 06-1448	Stokes (02CVD147)	Affirmed as to equitable distribution judgment; interim equitable distribution order VACATED
SIMMONS-BLOUNT v. GUILFORD CTY. BD. OF EDUC. No. 07-377	Guilford (06CVS7773)	Vacated and remanded with instructions
SMITH v. BENNETT No. 07-124	Wake (05CVS17455)	Affirmed
STATE v. BYERS No. 06-1704	Cherokee (04CRS2727-30)	No error
STATE v. CARTER No. 07-320	Wilson (05CRS55743) (05CRS56047) (06CRS52399)	We vacate case num- ber 05CRS55743 and remand case num- bers 05CRS56047 and 06CRS52399 for a new restitution award
STATE v. EDWARDS No. 06-1569	Wilson (05CRS52563) (05CRS8760)	No error
STATE v. EWELL No. 06-1494	Martin (03CRS1673-76)	No error
STATE v. FIELDS No. 07-317	Guilford (04CRS72874) (05CRS23217)	No error
STATE v. FLEMING No. 06-1646	Guilford (04CRS96693)	No error
STATE v. FREEMAN No. 07-175	Columbus (06CRS50036)	No error
STATE v. GEORGE No. 07-387	New Hanover (05CRS64024) (06CRS1235)	No error
STATE v. LANE No. 07-102	Wake (05CRS119261)	No error
STATE v. LESKIW No. 06-1687	Pitt (05CR52250)	Reversed and remanded
STATE v. LITTLE No. 07-62	Mecklenburg (03CRS47465) (03CRS226102-03)	No error; motion for appropriate relief remanded

STATE v. MAYS No. 07-78	Moore (05CRS53399) (05CRS53231) (05CRS7665)	No prejudicial error
STATE v. MEMMINGER No. 06-1478	Mecklenburg (04CRS246891-92)	Remanded for resentencing
STATE v. OGLESBY No. 04-1534-2	Forsyth (02CRS60325) (02CRS60329)	No prejudicial error
STATE v. PORTER No. 07-412	Cleveland (05CRS7035-38)	Reversed and remanded
STATE v. ROSS No. 07-404	Caldwell (02CRS9566-75)	Affirmed
STATE v. SANCHEZ No. 07-21	Forsyth (05CRS58338-40)	Affirmed
STATE v. SPARKS No. 06-1527	Davidson (04CRS54825)	Affirmed
STATE v. SULLIVAN No. 06-1688	Mecklenburg (04CRS253063-65)	No error as to trial; Dismissed as to suppression issue
STATE v. TAFT No. 07-264	Pitt (06CRS5473-74)	No error
STATE v. TERRANCE No. 07-90	Beaufort (04CRS1295)	No error
STATE v. TORRES No. 07-156	Cumberland (05CRS55819-22)	No error
STATE v. WIGGINS No. 07-492	Henderson (04CRS55852)	Affirmed
STATE v. WILSON No. 07-255	Iredell (05CRS53798-99) (05CRS14444)	DISMISSED as to the assignments of error pertaining to the dis- missal of defendant's motion to suppress. NO ERROR as to the trial.
WALSH v. TOWN OF WRIGHTSVILLE BEACH BD. OF ALDERMEN No. 05-1478-2	New Hanover (05CVS210)	Affirmed

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AGENCY

Prima facie case—mistaken use of rule of evidence as a rule of law—The trial court did not err in a negligence action arising out of an automobile accident by dismissing plaintiff's complaint against an estate with prejudice even though plaintiff contends he had a prima facie case of agency under N.C.G.S. § 20-71.1 that survived defendant's motion to dismiss, because: (1) the purpose of N.C.G.S. § 20-71.1 was to establish a ready means of proving agency in any case where it is charged that the negligence of a nonowner operator causes damage to the property or injury to the person of another; and (2) plaintiff cannot use a rule of evidence to establish he had a prima facie case of agency that survived defendant's motion to dismiss. **Atkinson v. Lesmeister, 442.**

APPEAL AND ERROR

Appealability—denial of motion to stay—necessity for petition for writ of certiorari—In an action in which plaintiff second tier subcontractor seeks to enforce its statutory mechanic's lien against the property owner, contractor, and contractor's surety for rental equipment furnished to a first tier site preparation subcontractor, defendants have no right to appeal from the trial court's failure to grant their motion for a stay pending final disposition of a bankruptcy action filed by the first tier subcontractor because they failed to petition for a writ of certiorari as required by N.C.G.S. § 1-75.12(c). **Park East Sales, L.L.C. v. Clark-Langley, Inc., 198.**

Appealability—double jeopardy—jury must be sworn in criminal case—The trial court did not err by denying defendant's motion to dismiss the State's appeal from an order dismissing one of two criminal charges pending against defendant based on double jeopardy, because: (1) in a criminal case, jeopardy does not attach until a competent jury has been empaneled and sworn; and (2) defendant made her oral motion to dismiss before jury selection had even begun. **State v. Newman, 382.**

Appealability—interlocutory order—dismissal of one count while another pending—Defendant's motion to dismiss the State's appeal from the dismissal with prejudice of one count against defendant for resisting, delaying or obstructing a public officer (RDO) while there was still another count pending for trespassing is denied even though defendant contends the appeal is from an interlocutory order, because: (1) in the instant case there was a decision, dismissal of the charge of RDO, but not a judgment since a sentence was not pronounced; and (2) if the legislature had intended that the State not be able to appeal unless and until the court dismissed all counts against a defendant or entered a judgment, N.C.G.S. § 15A-1445(a)(1) would not refer to a decision or dismissal of one or more counts. **State v. Newman, 382.**

Appealability—interlocutory order—jurisdictional—not raised by parties—Whether an appeal is interlocutory is jurisdictional and the issue was addressed in this case even though the parties did not raise the issue. **Duval v. OM Hospitality, LLC, 390.**

Appealability—motion to disqualify attorney denied—appeal interlocutory—The trial court's denial of defendants' motion to disqualify plaintiff's attorney was interlocutory and not subject to appeal where only a partial summary judgment had been granted on the underlying action. However, if the issue had been

APPEAL AND ERROR—Continued

addressed, it is clear that the trial court did not abuse its discretion. **Adams Creek Assocs. v. Davis**, 512.

Appealability—outside scope of order—Although defendant's remaining arguments concern errors that allegedly occurred during trial relating to the admission of evidence and rulings on defendants' defenses and counterclaims, these assignments of error are dismissed because: (1) they are not properly before the Court of Appeals since they are outside the scope of the order being appealed; and (2) the notice of appeal references the order entered on 6 September 2006 which found defendant in civil contempt, and thus defendants have properly appealed only from the court's determination of civil contempt. **Carter v. Hill**, 464.

Appealability—partial summary judgment—contributory negligence—Partial summary judgment was not interlocutory where the issue was contributory negligence, and granting the motion for summary judgment as to contributory negligence completely disposed of the case. **Duval v. OM Hospitality, LLC**, 390.

Appealability—partial summary judgment—writ of certiorari—judicial economy—Although plaintiff's appeal from the trial court's order granting defendants' joint motion for judgment on the pleadings is effectively an order of partial summary judgment and therefore an appeal from an interlocutory order, the Court of Appeals will treat the appeal as a petition for writ of certiorari and consider the order on its merits because this case is one of those exceptional cases where judicial economy will be served by reviewing the interlocutory order. **Carolina Bank v. Chatham Station, Inc.**, 424.

Appealability—summary judgment as to only one party—involuntary dismissal without prejudice—A summary judgment which did not dispose of the issues as to all parties was not dismissed as interlocutory where there had been a voluntary dismissal without prejudice as to the remaining party, the time for refiling that claim had expired, and the stipulation of dismissal did not contain language purporting to extend the time. The Court of Appeals did not believe that counsel was manipulating the Rules of Civil Procedure in an attempt to appeal an order that should not be appealable. **Duval v. OM Hospitality, LLC**, 390.

Appealability—use of child's social security benefits—substantial right—An interlocutory order involving DSS's use of a child's Social Security benefits and its failure to make Habitat for Humanity mortgage payments was immediately appealable. A substantial right is affected in that it involves DSS's right to use its discretion in disposing of funds that it receives in its capacity as a representative payee; that substantial right will be lost without immediate review because the DSS will not be able to recover the funds it was required to pay for the mortgage. **In re J.G.**, 496.

Assignments of error—record page number omitted—format incorrect—Rule 2 not invoked—Defendant's appeal was dismissed for appellate rules violations where defendant did not identify any assignment of error by the page where it appears in the record, used an improper index margin, double-spaced captions and headings, and used no appendix page reference, in violation of Appellate Rules 28(b)(6) and 26(g). Defendant did not amend or correct its violations and deficiencies. Appellate Rule 2 was not invoked to consider the appeal

APPEAL AND ERROR—Continued

because nothing in the record or briefs demonstrated exceptional circumstances to suspend or vary the rules. **Selwyn Village Homeowners Ass'n v. Cline & Co.**, 645.

Brief—assignments of error—record references not included—Defendants' appeal was subject to dismissal where they failed to comply with Appellate Rule 10(c)(1) by not including clear and specific record references in their assignments of error. **Capps v. NW Sign Indus. of N.C., Inc.**, 616.

Brief—questions presented—pertinent assignments of error required—Defendants' appeal was subject to dismissal where, following each of the questions presented, they cited all thirty-four of their assignments of error. Appellate Rule 28(b)(6) requires a reference to assignments of error pertinent to the question. **Capps v. NW Sign Indus. of N.C., Inc.**, 616.

Items not included in motion to suppress at trial—admission not challenged on appeal—A murder defendant whose motion to suppress a statement to officers did not include the earlier recovery of his guns could not challenge the admission of those guns on appeal. **State v. Young**, 343.

Judicial notice by Court of Appeals—appeal in another state—Judicial notice was taken by the Court of Appeals of defendants' appeal of an underlying judgment through the Texas courts. **Mineola Cmty. Bank v. Everson**, 668.

Necessary issue—other issues not addressed—The pivotal issue on an appeal was whether the trial court properly ordered DSS, as the representative payee of a child's Social Security benefits, to make payments on a Habitat for Humanity mortgage; it was not necessary to resolve other issues concerning the child's guardianship, the timing of the child support complaint, and an adoption subsidy. **In re J.G.**, 496.

No argument below—grounds for motion to dismiss—Defendant did not preserve for appellate review specific grounds not argued to the trial court on a motion to dismiss a first-degree murder charge. **State v. Muhammad**, 355.

Obtaining ruling on motion—language used in juvenile adjudication form—no prior objection possible—An assignment of error to the standard of proof in a indecent liberties proceeding against a juvenile was preserved where the juvenile appealed from the adjudication. The "clear, cogent, and convincing" language on the AOC adjudication form was not used in open court, so that the juvenile would not have been aware of the error and could not object to it until he received the adjudication. **In re B.E.**, 656.

Preservation of issues—denial of writ of certiorari—Although plaintiff contends under two cross-assignments of error that the trial court erred by granting a directed verdict for Gambill Oil Company, Inc. as well as a motion for directed verdict as to her claim of unfair and deceptive trade practices as to Gambill, Inc. and Jim Gambill, this issue is not addressed based on the Court of Appeals already denying plaintiff's petition for writ of certiorari to hear these arguments which were improperly preserved for appeal. **Ellison v. Gambill Oil Co.**, 167.

Peservation of issues—failure to object—Although plaintiff contends the trial court erred by granting summary judgment in favor of defendants when defendants presented no admissible evidence in support of their motion based on

APPEAL AND ERROR—Continued

a failure to properly authenticate an order from the Bankruptcy Court as required by N.C.G.S. § 8C-1, Rules 901 or 902, this assignment of error was not preserved for appellate review because plaintiff did not object to the admission of the order as required by N.C. R. App. P. 10(b)(1). **Morris v. Moore, 431.**

Preservation of issues—failure to object—failure to administer oath to witness—The trial court did not commit prejudicial error in a habitual driving while impaired case by questioning an officer after the close of the evidence without again informing the officer that he was still under oath because defense counsel neither objected nor attempted to question the officer at any time before, during, or after the trial court's questions. **State v. Jones, 405.**

Preservation of issues—failure to obtain ruling at trial—Although plaintiff contends the trial court erred in a foreclosure deficiency case by hearing defendants' joint motion for judgment on the pleadings without disposing of plaintiff's motion to continue, this argument is dismissed because plaintiff did not preserve this question for appellate review when it did not obtain a ruling from the trial court on its motion for a continuance as required by N.C. R. App. P. 10(b)(1). **Carolina Bank v. Chatham Station, Inc., 424.**

Preservation of issues—failure to raise constitutional issue at trial—The trial court did not err by sentencing defendant to consecutive terms of imprisonment for two counts of first-degree sexual offense even though defendant contends it violates the constitutional guarantee against double jeopardy, because: (1) defendant's vague passing mention of this issue after the jury had been instructed, returned its verdict, and had been dismissed from the courtroom was not sufficient to show it raised this constitutional issue to the trial court; and (2) defendant thus failed to preserve this issue for appellate review. **State v. Gobal, 308.**

Preservation of issues—new trial—Defendant's remaining assignments of error are not addressed because the case has already been reversed and remanded for a new trial. **Ellison v. Gambill Oil Co., 167.**

Preservation of issues—no objection at trial—no assignment of error in brief—Defendant did not preserve for appeal the question of whether the trial court erred by admitting testimony about a DNA examination and report by a nontestifying SBI agent. Defendant not only did not object to the jury receiving the report during deliberations, he consented, and further, did not assign error in his brief. **State v. Pettis, 116.**

Preservation of issues—objection not renewed—plain error not argued—An assignment of error concerning cadaver dog evidence was dismissed due to defendant's failure to properly preserve and present it or to request plain error review. **State v. Petrick, 597.**

Preservation of issues—trial judge not ruling on motion—no argument that ruling required—The issue of whether the trial court erred by refusing to rule on a motion to set aside another judge's order was not preserved for appeal where defendants did not argue that the trial court was required to rule on their motion. If it had been, the trial court did not by refusing to entertain the motion. **Adams Creek Assocs. v. Davis, 512.**

Pro se litigant—sanctions—Sanctions were imposed against pro se litigants who castigated plaintiff's counsel in an attempt to conceal their own deficient

APPEAL AND ERROR—Continued

pleadings and defense and who asserted that the judge committed fraud or was not impartial. The fact that a judge has ruled against a party does not constitute a basis for asserting fraud or impartiality. Taken together, defendants' violations are egregious and transcend the tolerance level ordinarily reserved for pro se litigants. **Mineola Cmty. Bank v. Everson**, 668.

Ruling obtained on motion to dismiss—court's statement—An assignment of error was considered on its merits where a juvenile moved to dismiss an indecent liberties allegation for insufficient evidence, the trial court took the case under advisement, and the court later stated that the statutory requirement for the offense had been met. **In re B.E.**, 656.

Superior court—motion to supplement record—affidavits—The superior court did not err by denying respondents' motion to supplement the record before the superior court with the affidavits of the Planning Director and Zoning Administrator for the county, and two people who did not testify before the board, because the affidavits were not before the board. **Lamar OCI S. Corp. v. Stanly Cty. Zoning Bd. of Adjust.**, 44.

Violations of requirements for brief—Rule 2 not invoked—Appellate Rule 2 was not invoked where violations of the Appellate Rules were egregious. Nothing suggests exceptional circumstances for suspending or varying the rules in order to prevent manifest injustice or to expedite decision in the public interest. **Capps v. NW Sign Indus. of N.C., Inc.**, 616.

ASSAULT

Assault on a female—not a lesser included offense of statutory rape—The trial court did not err by denying defendant's requested instruction on the offense of assault on a female as a lesser included offense of statutory rape. The crime of assault on a female requires proof of an assault, whereas statutory rape does not. Assault on a female requires proof that defendant is male, which is not required by statutory rape. **State v. Pettis**, 116.

Board as deadly weapon—lesser included offense—The trial judge in a felony assault prosecution correctly concluded that the issue of whether a 2x4 board was a deadly weapon was for the jury, but should then have instructed on the lesser included misdemeanor of assault inflicting serious injury. **State v. Tillery**, 447.

Deadly weapon on government official—hands and water—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of assault with a deadly weapon on a government official based on defendant using his hands to submerge a deputy's head, chest, and abdomen in a river and to hold him there, even though defendant contends hands and water are not a deadly weapon as a matter of law, because the State presented substantial evidence from which a reasonable juror could find that the manner in which defendant used his hands in conjunction with water was likely to cause death or serious bodily harm to the deputy, including evidence that defendant pushed the deputy into the water, forcibly held his head under the water, and pushed him back under the water after he managed to get a breath. **State v. Smith**, 57.

Deadly weapon on government official—lesser-included offense—misdemeanor assault on government official—The trial court in a prosecution for

ASSAULT—Continued

felony assault with a deadly weapon on a government official erred by refusing to submit to the jury the lesser-included offense of misdemeanor assault on a government official. **State v. Smith, 57.**

Knife as deadly weapon—evidence of serious wounds sufficient—The trial court did not err by instructing the jury that a knife was a deadly weapon where the knife was neither introduced nor described in detail, but there was uncontroverted evidence that the victim suffered life-threatening injuries, including a collapsed lung and nine stab wounds that required closure in a hospital operating room. **State v. Graham, 182.**

ATTORNEYS

Appealability—motion to disqualify attorney denied—appeal interlocutory—The trial court's denial of defendants' motion to disqualify plaintiff's attorney was interlocutory and not subject to appeal where only a partial summary judgment had been granted on the underlying action. However, if the issue had been addressed, it is clear that the trial court did not abuse its discretion. **Adams Creek Assocs. v. Davis, 512.**

Unauthorized practice of law—letter from prison—evidence not sufficient—Evidence of unauthorized practice of law was not sufficient where it consisted of a letter defendant wrote from jail to a witness in someone else's case, with an attached suggested affidavit. **State v. Williams, 233.**

BAIL AND PRETRIAL RELEASE

Bail bond—surety's motion to have bond repaid—denial not an abuse of discretion—The trial court did not abuse its discretion by denying a surety's motion to have a forfeited bond repaid. It is uncontested that there was a final judgment of forfeiture, and merely offering to pay for extradition hardly constitutes the extraordinary circumstances required for remission of the bond. **State v. Bakri, 467.**

Findings—surety's offer to pay for extradition—The trial court addressed the facts as required by N.C.G.S. § 1A-1, Rule 52 in a case in which a bail bond surety moved for relief from forfeit of the bond. A finding by the court concerning the surety's offer to pay for the extradition of a defendant encompassed the facts which the surety alleged the court had ignored. **State v. Bakri, 467.**

BURGLARY AND UNLAWFUL BREAKING OR ENTERING

First-degree burglary—instruction—failure to instruct on lesser-included offense of felonious breaking and entering—nighttime—The trial court did not err in a first-degree burglary case by denying defendant's motion to instruct the jury on the lesser-included offense of felonious breaking and entering, because: (1) there was no conflict as to the time period in which the unlawful entry occurred; (2) the evidence showed that the breaking happened shortly before 6:49 p.m., and given the court took judicial notice that 5:21 p.m. marked the end of civil twilight that day, the State's uncontroverted evidence was sufficient to fully satisfy its burden of proving that the breaking and entering occurred at some point during the nighttime; and (3) defendant's denial alone was insufficient to negate the nighttime element. **State v. Jordan, 576.**

BURGLARY AND UNLAWFUL BREAKING OR ENTERING—Continued

First-degree burglary—instruction—intent to feloniously assault—The trial court did not commit plain error in a first-degree burglary case by its instruction to the jury on an intent to feloniously assault theory even though defendant contends the evidence was only sufficient to demonstrate intent to murder, because the State presented sufficient evidence to support a finding of intent to feloniously assault. **State v. Jordan, 576.**

First-degree burglary—motion to dismiss—sufficiency of evidence—felonious intent—The trial court did not err by denying defendant's motion to dismiss the charge of first-degree burglary even though defendant contends the State's evidence tended to show intent to murder but not to commit felonious assault as alleged in the indictment because there was substantial evidence for a reasonable mind to conclude that, at a minimum, defendant unlawfully entered the victim's home with the intent to commit felonious assault even if this same evidence would also support an intent to murder theory. **State v. Jordan, 576.**

Instructions—intent controverted—misdemeanor breaking or entering as lesser included offense—The trial court did not err in a first-degree burglary prosecution by not instructing the jury on felonious breaking or entering. When the State established all of the elements of first-degree burglary except intent, it also established all of the elements of felonious breaking or entering except intent. The court correctly instructed on the lesser included offense of misdemeanor breaking or entering. **State v. Graham, 182.**

CHILD ABUSE AND NEGLECT

Adjudication orders—hearings to explain delays—effective date of statute—The statute concerning subsequent hearings to explain delays in adjudication orders in juvenile proceedings, N.C.G.S. § 7B-807(b), became effective on 1 October 2005 and does not apply to petitions filed before that date. **In re R.L. & N.M.Y., 529.**

Adjudicatory hearings—delays—prejudice—The fathers of children alleged to be neglected and dependent suffered prejudice as a result of the trial court's failure to conduct an adjudicatory hearing with the time frame prescribed by N.C.G.S. § 7B-801(c). Following the statutory timeliness would have allowed time to seek and comply with reunification orders from the trial court. **In re R.L. & N.M.Y., 529.**

Adjudicatory orders—statutory timelines—The trial court violated the statutory time limit found in N.C.G.S. § 7B-807(b) concerning adjudicatory orders in juvenile proceedings. The reason for the delay is not clear from the record. **In re R.L. & N.M.Y., 529.**

Child neglect—findings of fact—supporting evidence—The evidence in a child neglect case supported findings by the trial court that respondent parents failed to cooperate with DSS and failed to make reasonable progress on improving their parenting skills; respondents had not engaged in treatment services and continued to deny responsibility for injuries suffered by another child after their parental rights to that child were terminated for causing nonaccidental injuries to the child; respondents failed to participate in the Family PRIDE Program as directed by court order; respondents refused to schedule home visits by DSS even though the DSS social worker offered to come after regular hours; and respondents were consistently late to visitations with the child. **In re N.G., 1.**

CHILD ABUSE AND NEGLECT—Continued

Child neglect—risk of future abuse or neglect—injuries to another child—other factors—The trial court did not err by adjudicating respondents' third child to be a neglected juvenile based on the high risk of future abuse or neglect where, in addition to the fact that respondents' parental rights to their first child had been terminated on the ground that respondents were responsible for "shaken baby" and other nonaccidental injuries suffered by that child, the trial court also considered respondents' failure to participate in the PRIDE program, respondents' attempts to hide the fact of the mother's pregnancy, respondents' failure to inform DSS of a change of address, respondents' continued refusal to accept responsibility for the first child's injuries, respondents' failure to participate in anger management classes, respondents' consistent tardiness to visits, respondents' attempts to discount home visits from DSS, and evidence of recidivism rates. **In re N.G., 1.**

Neglect of third child—injuries to first child—responsibility of parents—collateral estoppel—Respondent parents in a child neglect case involving their third child were collaterally estopped from denying responsibility for "shaken baby syndrome" injuries suffered by their first child where, in an order terminating their parental rights to the first child, the trial court found that the first child "was an abused child in that she suffered physical injuries by other than accidental means while in the care of her parents." **In re N.G., 1.**

Neglected child—ceasing of reunification efforts and visitation—The trial court in a child neglect case did not abuse its discretion by concluding that reunification efforts would be futile and that reunification efforts and visitation should cease. **In re N.G., 1.**

Neglected child—failure to order kinship placement—The trial court did not err by declining a kinship placement for a neglected child where DSS completed kinship assessments with all relatives suggested by respondent parents, and family placement was inappropriate because the family members did not believe that the child was in need of protection and it would therefore not ensure the child's safety. **In re N.G., 1.**

Review hearing—delay prejudicial—A mother sufficiently demonstrated that she was prejudiced by the court's delay in conducting her review hearing after her children were adjudicated neglected and removed from her custody. It was unfair for the mother to receive feedback on her progress seven months after she was entitled to it. **In re R.L. & N.M.Y., 529.**

Review of reunification efforts—hearings continued—abuse of discretion—The trial court abused its discretion by continuing hearings for a dependent juvenile multiple times in a manner inconsistent with N.C.G.S. § 7B-803. The trial court's violations of the time limits set out in N.C.G.S. §§ 7B-801(c) and 7B-906(a) were not justified. **In re R.L. & N.M.Y., 529.**

CITIES AND TOWNS

Annexation—classification of tracts—subdivision test—A city substantially and strictly complied with the requirements of the annexation statute where petitioners disputed the classification of certain tracts, but the evidence and petitioners' own contention supported the classification as non-urban (despite the erroneous classification of one portion as residential); the city cor-

CITIES AND TOWNS—Continued

rectly excluded non-urban land from its calculations for purposes of N.C.G.S. § 160A-48(c) because it would confound the purpose of the statute to subject land which qualifies under subsection (d) to subsection (c) requirements; the evidence supported the court's finding that the city's mathematical calculations were supported by the evidence; and the city complied with the subdivision test. **Arnold v. City of Asheville, 542.**

Annexation—extension of police services—A city substantially complied with N.C.G.S. § 160A-47(s)(a) in a disputed annexation in promising to extend services. Although petitioners' contention was based on the officer to resident ratio in North Carolina, the city is required only to provide services on substantially the same basis as elsewhere within the city. **Arnold v. City of Asheville, 542.**

Change of ordinance—no notice or hearing required—There was no substantial change to an annexation ordinance necessitating notice or a second hearing where the only change to the ordinance was the deletion of one lot and there was no change in the subsections under which the city sought annexation. **Arnold v. City of Asheville, 542.**

CIVIL PROCEDURE

Motion to dismiss converted to summary judgment—matters outside pleadings presented to court—The trial court did not abuse its discretion by granting summary judgment in favor of defendants after a hearing on defendants' motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) in an action where plaintiff sought to get the trial court to order defendants to execute a deed returning ownership of property to him based on his living on the property and paying the taxes and upkeep on the property, because: (1) when matters outside of the pleadings are presented to the trial court during a hearing considering a motion to dismiss under Rule 12(b)(6) and the material is not excluded by the trial court, the motion is treated as one for summary judgment and disposed of under N.C.G.S. § 1A-1, Rule 56; and (2) the transcript of the hearing on defendants' motion to dismiss revealed that the trial court received and considered several documents outside of the pleadings. **Morris v. Moore, 431.**

Motion to dismiss converted to summary judgment—reasonable opportunity to present material—waiver—The trial court did not err by granting summary judgment in favor of defendants allegedly without providing plaintiff an opportunity to respond in an action where plaintiff sought to get the trial court to order defendants to execute a deed returning ownership of property to him based on his living on the property and paying the taxes and upkeep on the property, because: (1) plaintiff did not request a continuance or additional time to produce evidence; (2) plaintiff did not object to the admission of material outside the pleadings; and (3) plaintiff waived his right to complain when he himself first offered material outside of the pleadings to the trial court for consideration. **Morris v. Moore, 431.**

COLLATERAL ESTOPPEL AND RES JUDICATA

Collateral estoppel—issue fully determined—final judgment on merits—Defendants met their burden of establishing that plaintiff's current claim regard-

COLLATERAL ESTOPPEL AND RES JUDICATA—Continued

ing the property that had been conveyed to defendants was barred by the doctrine of collateral estoppel since the issue of whether the conveyance of the property to defendants was valid or limited in any way was fully determined by the Bankruptcy Court and its order constituted a final judgment on the merits. **Morris v. Moore, 431.**

CONFESSIONS AND INCRIMINATING STATEMENTS

Findings—no interrogation prior to waiver of rights—supported by evidence—Testimony from detectives supported findings that the police did not interrogate defendant prior to his waiver of his Miranda rights. The trial court chose to believe the detectives' rendition of the facts, rather than defendant's assertion that a supplemental report reflected the order in which he was questioned. **State v. Young, 343.**

Findings—timing of invocation of rights—findings complete—The trial court did not err by denying defendant's motion to suppress his statements to the police where he contended that the court's findings failed to resolve the issue of whether he invoked his rights before being interrogated by the police. The findings demonstrated the sequence of events in which defendant was questioned by the police and found specifically that defendant was not questioned about this killing until after he waived his rights. **State v. Young, 343.**

Timing of waiver of rights—question of fact—Where the dispute in the admission of defendant's statements to officers was the point at which defendant waived his rights and not whether he was in custody or made the statements voluntarily, the question is one of fact, not law, and review is limited to whether the findings are supported by the evidence. **State v. Young, 343.**

CONSTITUTIONAL LAW

Business incentives—Exclusive Emoluments—The trial court did not err by concluding that plaintiffs failed to state a claim for relief under the Exclusive Emoluments Clause of the North Carolina Constitution in an action challenging incentives given to a computer company to locate a manufacturing facility in North Carolina. The incentives and subsidies in this case are intended to promote the general economic welfare of the communities involved rather than to solely benefit the company, and do not amount to exclusive emoluments. **Blinson v. State, 328.**

Business incentives—Public Purpose Clause—failure to state a claim—The trial court did not err by concluding that plaintiffs failed to state a claim for relief under the Public Purpose Clause of the North Carolina Constitution in an action opposing incentives given to a computer company for locating a manufacturing facility in North Carolina. Plaintiffs' complaint focused exclusively on the purported benefits provided to the company and contained no allegations that the legislative bodies were not acting with a motivation to increase the tax base or alleviate unemployment and fiscal distress. **Blinson v. State, 328.**

Confrontation Clause—testimony about DNA analysis—opinion based on tests by others—Defendant's Confrontation Clause rights were not violated when one SBI agent testified about a DNA analysis performed by another agent. It is well established that there is no violation when an expert bases an opinion

CONSTITUTIONAL LAW—Continued

on tests performed by others and defendant has the opportunity to cross-examine the testifying expert about the basis of his or her opinion. **State v. Pettis, 116.**

Double jeopardy—resisting, delaying, or obstructing officer—acquittal of assaulting official—same evidence test—Defendant's right against double jeopardy was not violated by the prosecution of defendant on a charge of resisting, delaying or obstructing a public officer (RDO) in the superior court after defendant was acquitted of a charge of assault on a government official in the district court where the charge of RDO was based upon defendant "pulling away and elbowing at the officer" while the charge of assault on a government official was based upon defendant "elbowing" the officer; defendant need not have been under arrest in order for her "pulling away" from the officer to sustain a conviction of RDO; and the charges of RDO and assault on a government official were thus not based upon the same evidence. **State v. Newman, 382.**

Driving while impaired—standing to challenge constitutionality of checkpoint plan—The trial court erred in a driving while impaired case by concluding that defendant did not have standing to challenge the constitutionality of a motor vehicle checkpoint plan, and the case is remanded for findings and conclusions on the checkpoint's constitutionality, where the officer stopped defendant under the systematic checkpoint plan to conduct investigatory stops of anyone who turned to avoid the checkpoint. **State v. Haislip, 275.**

Effective assistance of counsel—court's ex mero motu excusal of potential juror—Defendant was not denied his right to the effective assistance of counsel in a murder trial when the trial judge questioned a potential juror and removed him for cause ex mero motu when the juror indicated that he would be unable to give both sides a fair trial if the murder arose out of a drug deal. The issue is whether the trial court properly excused a juror for cause, not whether defendant's Sixth Amendment rights were violated. **State v. Brower, 397.**

Effective assistance of counsel—failure to object—failure to show different result would have been reached—Defendant did not receive ineffective assistance of counsel in a common law robbery and conspiracy to commit common law robbery case based on his trial counsel's failure to object to the mention of his alleged coconspirator having taken a polygraph test. **State v. Carter, 259.**

Effective assistance of counsel—not moving to suppress test results—not ineffective—Defense counsel was not ineffective in not moving to suppress the results of gun tests obtained through trickery. Defendant voluntarily delivered his guns to police, despite the trickery, and the hope for relief from criminal charges (assuming that engendering hope is improper) involved unrelated charges. **State v. Young, 343.**

Pre-arrest silence—cross-examination—no error—There was no error where the trial court allowed the State to cross-examine defendant about his pre-arrest silence. The State was within its constitutional boundaries. **State v. Graham, 182.**

Registered sex offender—access to public park prohibited—The trial court did not err by granting summary judgment for the defendant town on a challenge to an ordinance which declared that entry into the public parks of the town by

CONSTITUTIONAL LAW—Continued

registered sex offenders was an offense against the regulations of the town. The ordinance is restrictive only as to defendant's public parks and does not violate the right to intrastate travel; it is not punitive in intent nor effect and does not violate the ex post facto clause; and it is rationally related to its intended purpose of protecting the health and safety of the citizens of the town. **Standley v. Town of Woodfin, 134.**

Right to counsel and right to testify—entitlement to both—Forcing defendant to choose between testifying or relinquishing his right to be represented by counsel constituted constitutional error in an armed robbery prosecution where the counsel was of the opinion that defendant's testimony would be false and the judge told defendant that he could proceed pro se if he insisted on testifying. **State v. Colson, 281.**

Right to remain silent—pre-trial exercise—admissible—There was no plain error in a first-degree murder prosecution in the admission of defendant's pre-trial exercise of his right to remain silent. The evidence served to explain the context of statements made by defendant after he was advised of his rights, the State did not make any prejudicial comment implying or inviting assumptions from defendant's silence, and defendant did not show that a fundamental error was committed or that the error (assuming there was one) changed the outcome. **State v. Muhammad, 355.**

Separation of powers—habitual DWI statute—prosecutorial discretion—Defendant's argument that the habitual DWI statute violates separation of powers, based on prosecutorial discretion, has been rejected in a case involving the Habitual Felon Act. Defendant neither argued nor does the evidence reflect an improper motive by the prosecutor. **State v. Johnson, 673.**

Standing to challenge business incentives—increased tax burden—Plaintiffs' status as taxpayers who suffered an increased tax burden from incentives given for locating a computer manufacturing facility in North Carolina was sufficient to provide standing for claims under the Public Purpose and Exclusive Emoluments Clauses of the North Carolina Constitution. **Blinson v. State, 328.**

Standing to challenge business incentives—no showing of membership in prejudiced class—Plaintiffs lacked standing to bring claims under the Uniformity of Taxation clause of the North Carolina Constitution and the Dormant Commerce clause of the United States Constitution challenging incentives given for locating a computer manufacturing facility in North Carolina. Plaintiffs have not demonstrated that they belong to a class prejudiced by the operation of the legislation. **Blinson v. State, 328.**

CONTEMPT

Civil and criminal—different acts—Defendants were found in civil and criminal contempt on the basis of different acts: they were found in civil contempt for failing to comply with an earlier order not to trespass, and in criminal contempt for threatening to disobey future orders. **Adams Creek Assocs. v. Davis, 512.**

Civil contempt—no underlying order or judgment—failure to give adequate notice—failure to make appropriate findings of fact—The trial court erred by holding defendants in civil contempt for failure to pay \$2,480 in a sum-

CONTEMPT—Continued

mary ejectment case, because: (1) the contempt order was not based on any underlying order or judgment since no judgment was reduced to writing as required by N.C.G.S. § 1A-1, Rule 58; (2) even if the trial court's underlying judgment had been properly entered, defendants had not been given adequate notice of the contempt proceeding when defendants were notified at the end of trial that they would be held in contempt until the debt was paid and they were taken immediately to jail with no good cause shown in violation of N.C.G.S. § 5A-23(a); and (3) the trial court failed to make the appropriate findings of fact including willfulness and the ability to comply, and to the contrary the court found defendants were not able to pay the court ordered amount. **Carter v. Hill**, 464.

Penalties—testimony of intended refusal to obey order—The trial court did not err by imposing penalties for indirect criminal contempt where the defendants testified in the court's presence that they would not obey the orders of the court. This constituted direct contempt; however, the penalty is the same for both direct and indirect criminal contempt, and defendants were afforded the assistance of counsel and the opportunity to testify and explain why they continued to trespass on the property. **Adams Creek Assocs. v. Davis**, 512.

Refusal to leave property—future arrest and bond—The trial court did not abuse its discretion in a trespass action where defendants testified that they would not leave the property and the court issued an order that defendants would be taken into custody if they were again found on the property. The court did not impose a sentence or recommit defendants, but provided that they must post a \$500 bond before being released from custody if they were again arrested for violating orders to stay off the property. **Adams Creek Assocs. v. Davis**, 512.

CRIMINAL LAW

Breakdown of adversarial process—pro se defendant—An assignment of error to the breakdown of the adversarial process by a defendant who represented himself was overruled. A defendant who represents himself cannot complain that the quality of his defense amounts to ineffective assistance of counsel. **State v. Petrick**, 597.

Clerical error in judgment—embezzlement—obtaining property by false pretenses—The trial court erred by entering judgment against defendant for embezzlement when he was charged with and found to be guilty by a jury of obtaining property by false pretenses, and the case is remanded to the trial court for the limited purpose of correcting this clerical error in the judgment and commitment. **State v. Estes**, 364.

Instruction on accident denied—no error—Any error in denying a first-degree murder defendant's request for a jury instruction on the defense of accident was harmless. The jury received instructions on possible lesser included offenses and found that all of the elements of first-degree murder were met. **State v. Muhammad**, 355.

Instruction on voluntary intoxication denied—deliberation and premeditation—The trial court did not err in a first-degree murder prosecution by denying the defendant's request for an instruction on the defense of diminished capacity by voluntary intoxication. There was no evidence suggesting that defendant

CRIMINAL LAW—Continued

was incapable of forming a deliberate and premeditated purpose to kill. **State v. Muhammad, 355.**

Instructions—self-defense—proof beyond a reasonable doubt of every element—The trial court erred in a felonious assault prosecution in which the jury was instructed to return a verdict of not guilty if it found that defendant acted in self-defense by failing to also specifically instruct the jury that it should return a verdict of not guilty if it concluded that the State failed to prove any of the elements beyond a reasonable doubt. **State v. McArthur, 373.**

Instructions—unanimity—no error—The trial court's instructions on unanimity in a statutory rape prosecution were not erroneous. **State v. Pettis, 116.**

Motion for mistrial—defendant's absence from courtroom during trial—voluntary and unexplained absence—waiver of right—Defendant's voluntary and unexplained absence from court subsequent to the commencement of trial constitutes a waiver of his right to confront his accuser. **State v. Davis, 242.**

Pattern jury instruction—self-defense—ambiguity—There is an ambiguity in the pattern jury instruction regarding self-defense: read literally, the instruction states that the elements of self-defense must be found beyond a reasonable doubt, suggesting that defendant bears the burden of proof. Trial judges are urged to take care in using the pattern self-defense instruction and to edit it to ensure that the burden of proof is correctly placed. **State v. McArthur, 373.**

Pretrial detention hearing—terrorist watch list—The prosecutor did not violate defendant's right to a fair trial in a first-degree murder prosecution when he explained during a pre-trial detention hearing that defendant was not the person with a similar name on the National Terrorist Watch List. **State v. Muhammad, 355.**

Pro se representation—appropriate safeguards—The trial court did not err by allowing defendant to represent himself pro se. The trial court engaged in the appropriate statutory inquiry and safeguards for defendant's election to proceed pro se. **State v. Petrick, 597.**

Prosecutor's argument—reasons to believe State's evidence instead of vouching for credibility of witness—The trial court did not err in a first-degree burglary and second-degree kidnapping case by failing to intervene ex mero motu to strike portions of the State's closing argument that a sheriff who testified for the State was an honest man that he was not trying to convict somebody for something they didn't do because the prosecutor's argument is properly characterized as one giving the jurors reasons why they should believe the State's evidence, as opposed to one personally vouching for the sheriff's credibility. **State v. Jordan, 576.**

Withdrawal of guilty plea—agreement not violated—The trial court did not err by denying defendant's motion to withdraw a guilty plea, based on breach of the agreement by the State, where the agreement did not specifically include release from custody and the State fulfilled the promises in the agreement. The lengthy delay between the plea and the motion, the lack of a fair and just reason, and the prejudice to the State (evidence was destroyed) overwhelmingly support the denial of the motion. **State v. Arias, 294.**

CRIMINAL LAW—Continued

Withdrawal of guilty plea—frustration of purpose—motion properly denied—The trial court did not err by denying defendant's motion to withdraw his guilty plea based on frustration of purpose. Though he argued that there was an implied condition that he would be released to provide assistance to the State, the State's share of the bargain was to dismiss a charge, defer sentencing, and agree to an unsecure bond, which it did. Moreover, the event which prevented release, extradition to Maryland, was reasonably foreseeable in that defendant had waived extradition well in advance of the plea. **State v. Arias, 294.**

DEEDS

Restrictive covenants—noxious and offensive uses—sewage treatment system—The trial court did not err by denying injunctive relief where respondent's development plan included a sewage treatment system and restrictive covenants prohibit noxious and offensive uses. There is no evidence supporting a finding that the proposed sewage treatment drip system would be a noxious or offensive use. **Lake Gaston Estates Prop. Owners Ass'n v. County of Warren, 606.**

Restrictive covenants—void for vagueness—In an action arising from a proposal to build condominiums in an area that had been used for a boat ramp and lake access, the court's findings supported the conclusion that restrictive covenants were void for vagueness and that the area was not subject to those restrictive covenants. **Lake Gaston Estates Prop. Owners Ass'n v. County of Warren, 606.**

Restrictive covenants—void for vagueness—insufficient material to extrapolate meaning—In an action arising from a proposal to build condominiums in an area that had been used for a boat ramp and lake access, the trial court did not err by finding a provision in a restrictive covenant void for vagueness where the court had only the two words "Reserved Commercial" from which to extrapolate meaning. **Lake Gaston Estates Prop. Owners Ass'n v. County of Warren, 606.**

DISCOVERY

Expert testimony—detective—act of collecting latent fingerprints from surface—fact witness—The trial court in a common law robbery case did not improperly allow the State to adduce expert testimony from a detective without complying with the discovery requirements for expert witnesses under N.C.G.S. § 15A-903(a)(2) because a witness does not give expert testimony in merely describing the act of collecting latent fingerprints from a surface. **State v. Hall, 267.**

Expert testimony—physician assistant—fact witness—protection from unfair surprise—The trial court in a common law robbery case did not improperly allow the State to adduce expert testimony from a physician assistant without complying with the discovery requirements for expert witnesses under N.C.G.S. § 15A-903(a)(2) because although the physician assistant apprised the jury of his diagnosis of the victim's muscle tenderness, an opinion informed by his specialized training and experience, he offered no opinion and brought no expertise to bear as to the subject at hand at defendant's trial; and the physician

DISCOVERY—Continued

assistant was properly treated as a fact witness for discovery purposes since his opinion as a physician assistant was not germane to the issue before the jury when neither the fact nor the degree of the victim's injuries was essential to the State's case. **State v. Hall, 267.**

DRUGS

Felony possession of methamphetamine—misdemeanor possession of drug paraphernalia—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motions to dismiss the charges of felony possession of methamphetamine and misdemeanor possession of drug paraphernalia because the evidence was sufficient as a matter of law to withstand the motions. **State v. Davis, 242.**

EASEMENTS

Relocation—no limiting language—The trial judge did not err by concluding that an easement with a boat ramp and lake access could be relocated from a reserved area to a new parcel. The language of the easement contains no restriction as to where the new right of way might be constructed. **Lake Gaston Estates Prop. Owners Ass'n v. County of Warren, 606.**

ENVIRONMENTAL LAW

Underground storage tanks—gas leak—strict liability—third-party exception—The trial court erred by refusing to charge the jury on the third-party exception to the strict liability provisions of the North Carolina Oil Pollution and Hazardous Substances Control Act (OPHSCA) arising out of the contamination of plaintiff's well water with gasoline from the underground storage tanks located at defendant Mini Mart because sufficient evidence was produced at trial to allow a reasonable inference from the jury that third party's actions were the cause of the discharge of gasoline. **Ellison v. Gambill Oil Co., 167.**

EVIDENCE

Cross-examination—invited error—The trial court did not err in a double first-degree sex offense, felony child abuse, and indecent liberties with a child case by allowing the testimony of a social worker during cross-examination by defendant because statements elicited by a defendant on cross-examination are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law. **State v. Gopal, 308.**

Hearsay—murder victim's statements—present sense impressions—There was no plain error in a murder prosecution in the admission of testimony about a murder victim's statements concerning her financial situation and that defendant had choked her after she had confronted him about their finances. This was the victim's present sense impression; there is not a rigid rule about the timing of "immediately thereafter." **State v. Petrick, 597.**

Hearsay—murder victim's statements—relevant to relationship with defendant and state of mind—The trial court did not abuse its discretion in a murder prosecution by admitting testimony about a murder victim's statements.

EVIDENCE—Continued

The statements were not offered to prove the truth of the matter, but were relevant to the victim's relationship with defendant, defendant's motive, and the victim's state of mind. **State v. Petrick, 597.**

Instantaneous conclusion—door kicked in—Testimony from officers at a burglary and assault scene that the front door had been forced or kicked in was admissible as a shorthand statement of fact because it constituted instantaneous conclusions drawn by the witnesses upon seeing the splintered door and the door frame ajar but still bolted. **State v. Graham, 182.**

Lay opinion testimony—statutory limit—matter of fact—opinion as to witness credibility—not plain error—A detective's testimony in a prosecution for first-degree sexual offense and related crimes against a child that a State's witness must have been less nervous during an interview with the detective because he was breathing less hard was an instantaneous conclusion as to mental state and matter of fact that was not subject to the limits of lay opinion testimony provided by N.C.G.S. § 8C-1, Rule 701. The detective's further testimony that because the witness became less nervous during the interview, he must have been telling the truth, was not a statement of fact, was subject to the Rule 701 limits of lay opinion testimony, and was inadmissible since it was an opinion on the credibility of the witness that was not helpful to the jury's determination of a fact in issue. However, the admission of this opinion testimony was not plain error. **State v. Gopal, 308.**

Letters—authentication—circumstances—Familiarity with handwriting is not the only way to authenticate a letter and the trial court here did not err by admitting letters attributed to defendant by a codefendant whom defendant contended was not familiar with his handwriting. **State v. Young, 343.**

Murder victim's faith—photograph of victim—personal effects—admission not plain error—There was no plain error in a first-degree murder prosecution in the admission of evidence of the victim's faith, a photograph of her when alive, and her bloody eyeglasses and other personal effects. **State v. Muhammad, 355.**

Prior charges—useful only to show propensity to violence—prejudicial—The trial court erred in an assault prosecution in which defendant claimed self-defense by allowing the State to cross-examine defendant about prior assault charges in which defendant claimed self-defense and which were voluntarily dismissed. The evidence could only be considered as proof of defendant's violent disposition, and specifically his propensity to attack on slight provocation and then claim self-defense. The error was prejudicial because there were no witnesses other than the victim and defendant, and the evidence certainly could have had a significant effect upon defendant's credibility. **State v. Goodwin, 638.**

Prior conviction—more than ten years old—admission not plain error—There was no plain error (defendant made a motion in limine but failed to objection at trial) in a first-degree murder prosecution in the admission of evidence of a prior conviction that was more than ten years old. **State v. Muhammad, 355.**

Prior crimes or bad acts—relevance to motive—The trial court properly admitted evidence in a murder prosecution about defendant's prior acts of dis-

EVIDENCE—Continued

honesty and bad character. The evidence tended to show defendant's motive, intent, preparation, plan, absence of mistake, and knowledge. **State v. Petrick, 597.**

Prior crimes or bad acts—threats—sending threatening letters—authentication—failure to show prejudice—The trial court did not commit prejudicial error by allowing defendant's alleged coconspirator to testify that defendant and another person had sent him threats, and to read to the jury three threatening letters that he testified he had received while in prison. **State v. Carter, 259.**

Questioning by trial court—promoting understanding of case—impartiality—no expression of opinion—The trial court did not err in a habitual driving while impaired case by asking an officer an additional question about defendant's behavior after the traffic stop because the trial court stated it was trying to understand the whole picture of what happened, and although it was outside the scope of what was appropriate for such a hearing, defendant made no legitimate argument that the judge was partial to the State's case. **State v. Jones, 405.**

Statutory rape—defendant's age—booking statement—other testimony—Any error was harmless where the defendant's pre-Miranda warning booking statement about his age was admitted in a statutory rape prosecution. There was other testimony about defendant's age from his mother. **State v. Pettis, 116.**

Testimony of reluctance to sue—not prejudicial—Testimony from the principal in a commercial real estate firm that he had been reluctant to pursue litigation in an action involving a commission was not prejudicial. **Weber, Hodges & Godwin Commercial Real Estate Servs., LLC v. Cook, 288.**

Victim impact—admission at guilt phase—no prejudice—The trial court erred, but there was no prejudice, where it admitted testimony from an assault victim's mother about how witnessing the attack had affected her mental health. This was victim impact evidence which was improper at the guilt phase but there was no reasonable possibility of another verdict without the testimony. **State v. Graham, 182.**

FALSE PRETENSE

Obtaining property by false pretenses—conspiracy to obtain property by false pretenses—motion to dismiss—sufficiency of evidence—aiding and abetting—The trial court did not commit prejudicial error by denying defendant's motions to dismiss the charges of obtaining property by false pretenses and conspiracy to obtain property by false pretenses at the close of the evidence where the jury could infer through defendant's actions and relationships to the parties that he knowingly and willingly laundered nearly one-half million dollars through his personal and business banking accounts in aiding and abetting multiple persons in obtaining property by false pretenses from the school system. **State v. Estes, 364.**

GUARANTY

Expiration provision—ambiguous—properly submitted to jury—The trial judge properly submitted to the jury the issue of whether a guaranty agreement had expired where the conflicting constructions offered by the parties were both reasonable constructions of the provision. **Kimbrell v. Roberts, 68.**

GUARANTY—Continued

Notice of claim—prejudice—The trial court did not err by denying defendant's motions for directed verdict and judgment n.o.v. based on plaintiff's alleged failure to provide a contractually required notice of claim on a guaranty. Although plaintiff contended that he had provided notice in a letter, that letter was not timely, even if the substance provided notice. However, the burden was on defendant to show that the lack of notice prejudiced her. **Kimbrell v. Roberts, 68.**

HOMICIDE

First-degree murder—short-form indictment—A short-form indictment was sufficient to allege first-degree murder. **State v. Muhammad, 355.**

First-degree murder—short-form indictment—sufficiency—The short-form indictment for first-degree murder is sufficient to confer jurisdiction. **State v. Young, 343.**

First-degree murder—sufficiency of evidence—motion for appropriate relief—The trial court did not err in a murder trial by denying defendant's post-trial motion for appropriate relief in which he argued that there was insufficient evidence that defendant murdered one of the victims. The State presented substantial evidence that defendant was guilty of this murder. **State v. Brower, 397.**

INDECENT LIBERTIES

Sufficiency of evidence—The State presented substantial evidence of each element of indecent liberties between children and that this juvenile was the perpetrator, and a motion to dismiss for insufficient evidence was properly granted. **In re B.E., 656.**

INDICTMENT AND INFORMATION

Constructive amendment through jury instructions—change from acting in concert to aiding and abetting—obtaining property by false pretenses—The trial court did not constructively amend the allegation in the indictment from acting in concert to aiding and abetting obtaining property by false pretenses through the jury instructions. **State v. Estes, 364.**

INTESTATE SUCCESSION

Establishing parentage—voluntary child support agreement—The trial court did not err by concluding that decedent's voluntary child support agreement was sufficient to establish his parentage of petitioner entitling petitioner to inherit from decedent under N.C.G.S. § 29-19(b)(2) through intestate succession. **In re Estate of Potts, 460.**

JUDGES

One judge overruling another—Rule 60 motion—Although defendants argue that the general rule barring one superior court judge from overruling another does not apply because their motion should be construed as having been brought under Rule 60, defendant's motion was not in fact brought under that section,

JUDGES—Continued

defendants did not seek to amend the motion, and defendants never raised this argument at trial. Moreover, if it was a Rule 60 motion, it was not timely. **Adams Creek Assocs. v. Davis**, 512.

JUDGMENTS

Foreign jurisdiction—pending appeal—Defendants cited no statutory or common-law authority for the claim that full faith and credit should not be accorded to a judgment where the underlying case is pending on appeal in the foreign jurisdiction. It was defendants' responsibility to seek a stay of the North Carolina proceedings in the trial court pursuant to N.C.G.S. § 1C-1705(a)(2). **Mineola Cmty. Bank v. Everson**, 668.

JURISDICTION

Appeal—subject matter jurisdiction only—In an appeal involving the summons and jurisdiction in a termination of parental rights hearing, it was clear that the trial judge had personal jurisdiction and that only subject matter jurisdiction was at issue where the parents appeared at a hearing without raising an objection to sufficiency of process. **In re D.B., C.B.**, 556.

Original summons not served—newly issued summons—newly commenced action—The trial court had jurisdiction in a termination of parental rights proceeding where the original summonses were not served, because the service of newly issued summonses commenced new actions and reinvoked the trial court's subject matter jurisdiction. **In re D.B., C.B.**, 556.

Personal jurisdiction—corporate activities—The trial court did not err by concluding that personal jurisdiction was properly asserted over nonresident defendants where they had asserted that their actions in North Carolina were as agents of corporate entities. The cases cited do not support the contention that the actions of a defendant as an employee or agent of another may not be considered for the purpose of establishing personal jurisdiction over defendant, and relevant North Carolina jurisprudence is to the contrary. **Brown v. Refuel Am., Inc.**, 631.

Subject matter—foreign judgment—pending appeal—The trial court did not lack subject matter jurisdiction in an action to enforce a foreign judgment where an appeal of that judgment was pending. Assuming that defendants invoked the correct statute, they did not assert the pendency of the Texas appeal and the record is silent as to any bond being posted. **Mineola Cmty. Bank v. Everson**, 668.

Subject matter—making of a false bomb threat at a school—proper statute—The trial court did not lack subject matter jurisdiction in a juvenile delinquency case based on the making of a false bomb threat at a school even though the juvenile was charged, tried, and convicted under N.C.G.S. § 14.69.1(a), which applies to any building, rather than N.C.G.S. § 14.69.1(c), which applies to any public building. **In re B.D.N.**, 108.

JURY

Selection—death qualification—Batson challenge—The trial court did not err by denying defendant's *Batson* challenge to the State's peremptory challenge

JURY—Continued

of a juror. Defendant's argument is a thinly veiled attack upon death qualifying the jury, but the law is clear that death qualification does not violate a defendant's rights under the federal or state constitutions. **State v. Brower, 397.**

Verdict—inconsistencies—surplusage—The trial court did not abuse its discretion by denying plaintiffs' motion for a new trial based on the jury's failure to follow the judge's instructions where the jury had been instructed that plaintiffs could not recover for both breach of contract and implied contract and the jury answered issues as to implied contract even though it found that there was an express contract. The inconsistent answers were disregarded as surplusage; moreover, there was no inconsistency in the actual verdict in that each of those issues was answered for defendant and it was clear from the face of the verdict that the jury believed that plaintiffs should not prevail. **Strum v. Greenville Timberline, LLC, 662.**

JUVENILES

Delinquency—making false bomb threat at school—motion to dismiss—proper statute—plain error analysis—Although a juvenile contends the trial court committed plain error by denying her motion to dismiss based on an alleged improper conviction under N.C.G.S. § 14-69.1(a) for making a false bomb threat at a school even though she contends she should have been charged under N.C.G.S. § 14-69.1(c) which deals specifically with public buildings, this assignment of error is dismissed because: (1) our Supreme Court has applied the plain error rule only to issues relating to jury instructions or the admissibility of evidence; and (2) this issue does not fall within these categories. **In re B.D.N., 108.**

Delinquency—making false bomb threat at school—sufficiency of evidence—The trial court did not err by denying respondent juvenile's motion to dismiss a juvenile delinquency petition based on a violation of N.C.G.S. § 14-69.1(a) for making a false bomb threat at a school where (1) two students testified they saw the words "Bomb at Lunch" on a school calculator; (2) a teacher stated the juvenile should have been the last student to use the pertinent calculator prior to another student finding the message on 8 May 2006; (3) a student testified that a few days after the bomb threat she heard the juvenile say that she meant it as a prank and that she did not think they would take it seriously; and (4) another student testified that a day after the bomb threat, she heard the juvenile tell another student that the reason the juvenile did the bomb threat was based on the fact that she thought it would be fun to get out of school. **In re B.D.N., 108.**

Indecent liberties proceeding—standard of proof—The standard of proof in a juvenile indecent liberties proceeding could not be ascertained from the record, and the adjudication was remanded. The AOC preprinted form referred to "clear, cogent, and convincing" evidence, while the trial court referred to reasonable doubt in a passing comment. The trial court must unequivocally state the standard of proof. **In re B.E., 656.**

Untimely filing of petition—lack of subject matter jurisdiction—disposition order vacated—The trial court lacked subject matter jurisdiction to consider a juvenile petition for commission of the criminal offense of misdemeanor larceny, and the disposition order entered on an adjudication of delinquency is vacated, because: (1) N.C.G.S. § 7B-1703 provides that the petition must be filed

JUVENILES—Continued

within, at a maximum, thirty days after receipt of the complaint; and (2) although the intake counselor made a timely determination that a petition should be filed, the petition was not filed in the office of the clerk of superior court until more than thirty days after receipt of the complaint. **In re J.B.**, 301.

KIDNAPPING

Second-degree—instruction—plain error—evidence inconsistent with theory upon which jury was instructed—The trial court committed plain error in a second-degree kidnapping case by instructing the jury that defendant could be found guilty of kidnapping only if defendant restrained the victims for the purpose of committing first-degree burglary, and defendant is entitled to a new trial because: (1) the evidence showed that the burglary occurred before, not after, the kidnapping; and (2) the evidence is inconsistent with the theory upon which the jury was instructed. **State v. Jordan**, 576.

Second-degree—instruction—plain error—restrained—confined—The trial court did not commit plain error in a second-degree kidnapping case by its use of the term “restrained” while the indictment alleged “confined,” because given the strength of the evidence against defendant, there was no reasonable basis to conclude that use of the word “confine” would have altered the jury’s verdict. Since this type of error is likely to reoccur, the Court of Appeals noted that the terms “restrain” and “confine” are not synonymous. Instead, it concluded that evidence showing that the victims were held at gunpoint in the kitchen was sufficient to find that the victims were both “restrained” and “confined.” **State v. Jordan**, 576.

LACHES

Rezoning—defense raised by county—no injury shown—The trial court did not err by refusing to grant summary judgment for defendant county on the defense of laches in an action which sought to invalidate a rezoning. Although the company which sought the rezoning invested substantial sums in reliance on defendant’s actions, the evidence does not demonstrate that defendant itself sustained any injury. **McDowell v. Randolph Cty.**, 17.

LIENS

Second tier subcontractor—claim of lien on funds—summary judgment improper—Summary judgment for plaintiff second tier subcontractor cannot be sustained on the basis of a claim of lien on funds under N.C.G.S. § 44A-18(2) in an action in which plaintiff seeks to enforce a statutory lien against the property owner, contractor and contractor’s surety for rental equipment furnished to a first tier subcontractor because a genuine issue of material fact exists as to whether an unpaid contract balance remains between the contractor and the first tier subcontractor. **Park East Sales, L.L.C. v. Clark-Langley, Inc.**, 198.

Second tier subcontractor—claim of lien on property—summary judgment improper—Summary judgment for plaintiff second tier subcontractor cannot be sustained on the basis of a claim of lien on real property under N.C.G.S. § 44A-23(b)(1) in an action in which plaintiff seeks to enforce a statutory lien against the property owner, contractor and contractor’s surety for rental

LIENS—Continued

equipment furnished to a first tier subcontractor because an affidavit of the first tier subcontractor's president created a genuine issue of material fact as to the amount plaintiff is owed on its contract with the first tier subcontractor and thus the amount of its lien claim. **Park East Sales, L.L.C. v. Clark-Langley, Inc.**, 198.

MANDAMUS

To enforce zoning plan—third party injury—mandamus not appropriate—The trial court did not err by denying plaintiff's request for a writ of mandamus to enforce the zoning plan in place before an illegal spot zoning. Mandamus is not appropriate when it injuriously affects the rights of those not parties to the action; the landowner here had been dismissed from the action and would be injuriously affected by the mandamus. **McDowell v. Randolph Cty.**, 17.

MEDICAL MALPRACTICE

Fall by patient—failure to use restraints—Rule 9(j) certification missing—The trial court correctly entered summary judgment for defendant based on the failure to include a Rule 9(j) certification in an action involving a disoriented patient's fall in a hospital. Plaintiff argued that the claim was for ordinary negligence arising from failure to follow a fall prevention plan and a failure of supervision, but the complaint concerned the failure to use restraints, which was a medical decision. **Sturgill v. Ashe Mem'l Hosp., Inc.**, 624.

Proximate cause—expert testimony—specialities of witnesses—In a medical malpractice action, expert testimony on causation (rather than the standard of care) is competent as long as it is helpful to the jury and is based on information reasonably relied upon. The trial court here erred by granting a judgment NOV for defendants in an action arising from a back injury where defendants contended that plaintiffs' evidence of proximate causation did not come from appropriate experts. **Weaver v. Sheppa**, 412.

MORTGAGES AND DEEDS OF TRUST

Foreclosure deficiency—replying to affirmative defenses—The trial court did not err in a foreclosure deficiency case by granting defendants' motion for judgment on the pleadings under N.C.G.S. § 1A-1, Rule 12(c) even though plaintiff contends it was inequitable given the fact that N.C.G.S. § 1A-1, Rule 7(a) allegedly prevented it from replying to defendants' affirmative defenses, because: (1) plaintiff could have filed a motion under N.C.G.S. § 1A-1, Rule 7(a) requesting permission to file a reply, but failed to do so; (2) plaintiff did bring the defenses of equitable estoppel and unjust enrichment to the attention of the trial court by way of its response to defendant's motion, its trial brief, and its arguments before the trial court; and (3) the dispositive fact in the trial court's order, the amount yielded by the foreclosure sale, was contained in plaintiff's complaint and was undisputed by defendant. **Carolina Bank v. Chatham Station, Inc.**, 424.

Foreclosure sale—calculation of deficiency—The trial court did not err in a foreclosure deficiency case by granting defendants' motion for judgment on the

MORTGAGES AND DEEDS OF TRUST—Continued

pleadings on the issue that the amount yielded by the foreclosure sale for the purpose of calculating the deficiency is \$1,021,911.80, because: (1) the amount for which the property was sold to plaintiff at the foreclosure sale is the amount yielded by the foreclosure sale and is to be used to determine whether a deficiency existed; and (2) the amount of the subsequent sale by plaintiff to a third party was irrelevant. **Carolina Bank v. Chatham Station, Inc.**, 424.

MOTOR VEHICLES

Driving while impaired—standing to challenge constitutionality of checkpoint plan—The trial court erred in a driving while impaired case by concluding that defendant did not have standing to challenge the constitutionality of a motor vehicle checkpoint plan, and the case is remanded for findings and conclusions on the checkpoint's constitutionality, where the officer stopped defendant under the systematic checkpoint plan to conduct investigatory stops of anyone who turned to avoid the checkpoint. **State v. Haislip**, 275.

Driving while impaired—sufficiency of evidence—There was sufficient evidence of driving while impaired to go to the jury where defendant failed the field sobriety tests, his eyes were bloodshot and his speech slurred, there was an empty can of beer in his car and he admitted to having had four beers, and he refused to take an intoxilyzer test. **State v. Johnson**, 673.

Habitual driving while impaired—sufficiency of findings of fact—The trial court did not err in a habitual driving while impaired case by allegedly making insufficient findings of fact that defendant committed any traffic violations, because: (1) the order in open court and the written order signed by the court found such violations; and (2) the trial court specifically found that the officer initiated a traffic stop on his suspicion that defendant could have violated North Carolina law including driving while under the influence and for a registration plate law violation. **State v. Jones**, 405.

NEGLIGENCE

Darkened motel staircase—contributory negligence—summary judgment—The trial court erred by granting summary judgment for a motel owner on the basis of contributory negligence in an action by a guest who fell in a darkened staircase. A jury could find that plaintiff knew that the stairwell was dark and should have found another way out of the motel, but could also find that plaintiff was not aware of any other way out of the motel and used proper care in descending the dark stairs. **Duval v. OM Hospitality, LLC**, 390.

Darkened motel staircase—summary judgment—The trial court correctly denied defendant's summary judgment motion on the issue of negligence in an action arising from a motel guest falling when descending a darkened staircase. **Duval v. OM Hospitality, LLC**, 390.

OBSCENITY

Child pornography—possession—sufficiency of evidence—The State presented sufficient evidence to prove that defendant was in possession of child pornography, and that defendant was the person in the house who collected child pornography. **State v. Dexter**, 587.

OBSTRUCTION OF JUSTICE

Attempted intimidation of witness—letter from prison—evidence not sufficient—The evidence of attempted intimidation of a witness was not sufficient where it consisted of a letter defendant wrote from jail to a witness in another case. The letter was not threatening, coercive, or menacing, does not hint at bodily harm or violence, contains no cursing, vulgarity, threatening language, maintains a courteous tone throughout, asks the witness to think things over and talk with an attorney, and urges her to follow the law. **State v. Williams, 233.**

PROCESS AND SERVICE

Failure to secure service of process—dismissal of action with prejudice—agency claim—The trial court did not err in a negligence action arising out of an automobile accident by dismissing plaintiff's complaint against defendant estate with prejudice because plaintiff's failure to secure service of process on the individual defendant, the purported driver of the vehicle involved in the accident, absolved the owner of the automobile, the deceased, of any liability. **Atkinson v. Lesmeister, 442.**

PUBLIC ASSISTANCE

Social Security—anti-alienability—court ordered mortgage payments—The trial court did not violate the anti-alienability provision of the Social Security Act when it ordered DSS to use a part of a dependent child's Social Security payments for a Habitat for Humanity mortgage. In this case, no other person or entity gained control over the child's funds; DSS continued to control the funds, but was merely directed by the court in its supervisory role to use a portion of the funds to keep the mortgage current for the direct benefit of the child. **In re J.G., 496.**

Social Security benefits—DSS expenditure—The North Carolina state courts are not preempted from looking into DSS's expenditure of the Social Security benefits of a child in DSS custody, and the trial court here properly exercised jurisdiction as part of its supervisory role. DSS reimbursed itself for the cost of care and did not make payments on a Habitat for Humanity mortgage for a house which would become the child's when he ages out of care. **In re J.G., 496.**

RAPE

Assault on a female—not a lesser included offense of statutory rape—The trial court did not err by denying defendant's requested instruction on the offense of assault on a female as a lesser included offense of statutory rape. The crime of assault on a female requires proof of an assault, whereas statutory rape does not. Assault on a female requires proof that defendant is male, which is not required by statutory rape. **State v. Pettis, 116.**

Sexual battery—not a lesser included offense of rape—The offense of sexual battery under N.C.G.S. § 14-27.5A(a)(2) is not a lesser included offense of second-degree rape under N.C.G.S. § 14-27.3(a)(2). Sexual battery has a purpose element that requires the act to be completed for sexual arousal, gratification, or abuse, which is not an element of second-degree rape. **State v. Pettis, 116.**

REAL PROPERTY

Action for commission—authority to sign agreement—The evidence was sufficient to support a jury verdict for defendant in an action to collect a real estate commission where there was competent evidence that the person who signed the Buyer Agency Agreement did not have the authority to bind defendant and defendant's name did not appear on the document. **Strum v. Greenville Timberline, LLC, 662.**

Commercial commission—damages—The trial court did not err by denying defendants' motion for a new trial in an action concerning a commercial real estate commission. Although defendants argue that the listing agreement limited plaintiff's recovery to actual damages, the agreement contained no such provision and no authority was cited for the proposition. **Weber, Hodges & Godwin Commercial Real Estate Servs., LLC v. Cook, 288.**

Commercial commission—violation of exclusive right to sell—The trial court did not err by denying defendant's motion for a judgment n.o.v. in an action for a commercial real estate commission. Plaintiff met its burden of presenting evidence of its expectation evidence; defendants competed with plaintiff and breached their obligations under the exclusive right to sell in the listing agreement. **Weber, Hodges & Godwin Commercial Real Estate Servs., LLC v. Cook, 288.**

Torrens registration—service not properly obtained on one heir—no challenge by that heir—Although defendants in an action involving a Torrens property registration argued that the decree of registration was not valid because one of the heirs was not properly served, defendant did not cite any cases holding that the failure to notify another party, not the defendants themselves, voids a decree of registration that is not being challenged by the heir who allegedly was not notified. Furthermore, defendants are attempting to raise issues that have already been adjudicated. **Adams Creek Assocs. v. Davis, 512.**

ROBBERY

Actual force—necklace snatched from neck—There was sufficient evidence to support a conviction for common law robbery where defendant snatched a gold necklace from the victim's neck and the necklace broke as the defendant ripped it off. **State v. Harris, 437.**

Common law—motion to dismiss—sufficiency of evidence—taking property by violence or putting victim in fear—larceny from person—The trial court erred by denying defendant's motion to dismiss the charge of common law robbery, and the case is remanded for a conviction and sentencing on larceny from the person, because: (1) while there was a battery when the victim was sprayed with pepper spray on the back of the head, it did not induce the victim to part with the money nor did the force instill the necessary fear; (2) the State's argument that the victim's lack of resistance proved that he was put in fear was unconvincing when the victim's own testimony was that he was instructed not to give chase in the event of a robbery; (3) the record showed no evidence that the money was taken from the victim by the use of violence or putting him in fear; and (4) there was sufficient evidence of larceny from the person when the victim had the money close at hand and was in the middle of replenishing an ATM when the money was removed from his possession. **State v. Carter, 259.**

SEARCH AND SEIZURE

Child pornography—probable cause for warrant—evidence sufficient—There was sufficient evidence for probable cause for a search warrant in a child pornography case where the evidence which defendant challenged was not the only evidence offered. **State v. Dexter, 587.**

Frisk of black male—mere generalized suspicion—The trial court erred by denying defendant's motion to suppress evidence from a frisk which led to a conviction for aiding and abetting an armed robbery of a convenience store. It cannot be concluded, under all the circumstances, that the officer had more than a hunch or generalized suspicion; upholding the decision below would be holding, in effect, that the police could stop any black male found within a quarter of a mile of a robbery in the time immediately after a robbery committed by a black male. **State v. Cooper, 100.**

Probable cause for vehicle stop—officer's mistaken belief about speed limit—An officer's stop of a motor vehicle based on a mistaken belief that a speeding violation occurred is not objectively reasonable and cannot support probable cause to stop the vehicle. The trial judge in this case correctly granted defendant's motion to suppress evidence of driving while impaired where the sole reason for the stop was the officer's mistaken belief about the speed limit in that area. **State v. McLamb, 124.**

Probable cause for vehicle stop—reasonable suspicion—driving while impaired—The trial court did not err in a habitual driving while impaired case by denying defendant's motion to suppress even though defendant contends an officer did not have probable cause to stop her, because: (1) it is unnecessary to determine whether he had probable cause for a registration violation when the totality of circumstances revealed the officer had reasonable suspicion to stop defendant for DWI; and (2) contrary to defendant's assertion, the DWI statute has no requirement that a vehicle must be interfering with traffic in order for an officer to constitutionally stop a vehicle. **State v. Jones, 405.**

Probable cause for warrant—child pornography—reliability of informant—An informant was correctly found to be a reliable source for information leading to a search warrant despite her use of a variation of her name which was not widely known and her subsequent recantation. **State v. Dexter, 587.**

Search warrant—child pornography—delay from tip to warrant—The time between the date a tip was received in a child pornography case and the issuance of a search warrant was not excessive. The person delivering the tip indicated that she had made copies of everything on defendant's computer, all of the evidence stated in the affidavit was obtained within twenty-four hours of the tip, and it was apparent that investigators waited for verification by an Internet service provider that a profile belonged to defendant. **State v. Dexter, 587.**

Traffic stop—improper tags sufficient—Improper license tags provided sufficient cause to stop defendant, and the trial court did not err by denying defendant's motion to suppress the resulting evidence of driving while impaired. **State v. Johnson, 673.**

Warrant application—no inconsistency—There was no inconsistency in statements by an officer in a search warrant application that criminal computer users hide their files and that an informant living in the house would have had a

SEARCH AND SEIZURE—Continued

reasonable opportunity to view images on defendant's screen. Furthermore, although defendant rejects the officer's explanation for the informant's recantation, the informant's e-mail clearly stated that she was afraid of defendant. **State v. Dexter, 587.**

SENTENCING

Aggravating factors—not submitted to jury—harmless error—Errors in not submitting aggravating factors to the jury when sentencing defendant for two counts of involuntary manslaughter arising from impaired driving were harmless. The evidence of knowingly creating a risk to more than one person with a hazardous device was overwhelming and uncontroverted, and the guilty verdicts on the two involuntary manslaughter charges necessarily show that defendant killed another in the course of conduct of each offense. **State v. Speight, 93.**

Aggravating factors—not submitted to jury—special verdict—There was no plain error in sentencing this defendant between the decision in *Blakely* and the legislation expressly authorizing the submission of aggravating factors to a jury. The court submitted the aggravating factors to the jury by means of a special verdict. **State v. Graham, 182.**

Consolidated offenses—remand for resentencing—Defendant's conviction for resisting a public officer is remanded for resentencing, because: (1) the trial court consolidated this conviction with defendant's convictions for assault with a deadly weapon on a government official and attaining habitual felon status for sentencing purposes; and (2) a new trial was ordered on the assault conviction, and defendant's conviction for attaining habitual felon status was vacated. **State v. Smith, 57.**

Felony murder—arrest of one of two underlying charges—The trial court did not err by not arresting both of the felonies underlying felony murder, but should have arrested one. **State v. Young, 343.**

Habitual felon—ancillary to indictment for substantive felony—Defendant's conviction for attaining habitual felon status is vacated because: (1) North Carolina's Habitual Felons Act does not authorize an independent proceeding to determine a defendant's status as a habitual felon separate from the prosecution of a predicate substantive felony, and the habitual felon indictment is necessarily ancillary to the indictment for the substantive felony; and (2) a new trial was ordered on defendant's conviction for felony assault with a deadly weapon on a government official. **State v. Smith, 57.**

Habitual felon—defendant not present in courtroom—The trial court did not err by arraigning defendant as an habitual felon under N.C.G.S. § 15A-928 in open court, and by moving forward immediately with habitual felon proceedings following defendant's convictions while he was still not present in the courtroom, because assuming defendant was required to be present for the habitual felon proceedings since they concerned a sentence enhancement, he failed to show any prejudicial effect resulting from his absence. **State v. Davis, 242.**

Impaired driving—aggravating factors—not duplicative—Factors aggravating driving while impaired were not duplicative where the two factors were that defendant's impaired driving caused serious injury to another person and that

SENTENCING—Continued

defendant used a motor vehicle in the commission of a felony that led to the death of two people. **State v. Speight, 93.**

Prior record level—prior probationary status—determination by jury required—In a case remanded on other grounds, the trial court must submit defendant's prior probationary status to the jury for proof beyond a reasonable doubt, unless it is admitted by defendant, in order to use that status to enhance defendant's prior record level for the purpose of sentencing. **State v. Colson, 281.**

Prior record level—resentencing—conviction after sentencing—When recalculating a defendant's prior record level at resentencing, the court may consider a conviction that was entered after the original sentencing but before the resentencing. **State v. Pritchard, 128.**

Sale and delivery of drugs—single transfer—A conviction for both sale and delivery of cocaine and marijuana arising from a single sale of each was remanded for resentencing for sale or delivery of each substance. **State v. Rogers, 676.**

SEXUAL OFFENSES

Child pornography—exploitation of minor—elements—There are two requirements for the offense of third-degree sexual exploitation of a minor: knowledge of the character or content of the material, and possession of material that contains a visual representation of a minor engaging in sexual activity. There is no requirement of "knowing possession" of child pornography. **State v. Dexter, 587.**

Registered sex offender—access to public park prohibited—The trial court did not err by granting summary judgment for the defendant town on a challenge to an ordinance which declared that entry into the public parks of the town by registered sex offenders was an offense against the regulations of the town. The ordinance is restrictive only as to defendant's public parks and does not violate the right to intrastate travel; it is not punitive in intent nor effect and does not violate the ex post facto clause; and it is rationally related to its intended purpose of protecting the health and safety of the citizens of the town. **Standley v. Town of Woodfin, 134.**

Sexual battery—not a lesser included offense of rape—The offense of sexual battery under N.C.G.S. § 14-27.5A(a)(2) is not a lesser included offense of second-degree rape under N.C.G.S. § 14-27.3(a)(2). Sexual battery has a purpose element that requires the act to be completed for sexual arousal, gratification, or abuse, which is not an element of second-degree rape. **State v. Pettis, 116.**

STATUTES OF LIMITATION AND REPOSE

Limitations—Torrens Act registration—Defendants' motion involving the application of the Torrens Act in a 1979 proceeding was not timely under either the one-year statute of limitations of N.C.G.S. § 43-26 or the three-year statute of limitations of N.C.G.S. § 1-52(9). **Adams Creek Assocs. v. Davis, 512.**

TAXATION

Ad valorem taxes—failure to assess—interest—Nothing in N.C.G.S. § 105-394 allows a county to attempt to collect interest and penalties in addition to back taxes allegedly owed when the county grossly and repeatedly failed to assess the listed property. **In re Appeal of Morgan, 567.**

Ad valorem taxes—failure to assess—not an immaterial irregularity—A county's failure to include an assessment for petitioner's residence in her tax bills from 1995 through 2003 was not an immaterial irregularity. There was substantial evidence tending to show that the county had multiple opportunities to assess the property, but failed to do so. **In re Appeal of Morgan, 567.**

Business personal property tax—leased computer equipment—valuation—burden of proof—The Property Tax Commission erred by upholding a county's valuation of 40,779 pieces of leased computer equipment for business personal property taxes in tax year 2001 based on an improper application of the burden of proof framework mandated by our Supreme Court, and the case is remanded so that the Commission may reconsider the evidence in light of the proper burdens of production and persuasion. **In re Appeal of IBM Credit Corp., 223.**

TERMINATION OF PARENTAL RIGHTS

Dismissal of first petition—second petition not barred by res judicata—A second petition to terminate respondent mother's parental rights was not barred by res judicata after the first petition was dismissed for failure to conduct the adjudicatory hearing within 90 days after the petition was filed because there was no identity of issues between the first and second petitions where the trial court ordered that grounds for termination under the second petition could only be established by facts that occurred after the first petition was filed; findings of fact in the termination order as to events that occurred prior to the filing of the first petition were essentially background information without which the order would not make sense; and the substantive factual findings upon which the trial court based its conclusions of law as to the grounds for termination of parental rights all concerned facts that occurred after the first petition was filed. **In re I.J. & T.J., 298.**

Failure to hold timely hearing—no prejudice—There was no prejudice in a termination of parental rights proceeding from the failure to hold a timely hearing. The contentions of respondents amount to nothing more than boilerplate assertions used by numerous respondents attempting to show prejudice, including inability to appeal and a lack of permanency. The record is devoid of any evidence showing that but for the delay the result of the hearing would have been different. **In re D.B., C.B., 556.**

Family reunification efforts—housing and transportation—The trial court did not violate the Federal Adoption and Safe Families Act in the provision of services for the reunification of the family where respondent contended that she was unable to overcome her poverty to meet the goals set by DSS, specifically in transportation and housing. DSS provided foster care services, and nowhere is it stated that DSS must provide housing aid and permanent transportation. In fact, case law appears to reach the opposite conclusion. **In re A.R.H.B. & C.C.H.L., 211.**

TERMINATION OF PARENTAL RIGHTS—Continued

Late written order—oral rendition presumed correct—A mother whose parental rights were terminated was not prejudiced by the trial court's pattern of entering orders late, which she contended inhibited her efforts to complete her case plan. There was no transcript of the hearing, and it is presumed that the court's oral rendition of its order stated everything found in the subsequent written order. **In re A.R.H.B. & C.C.H.L., 211.**

Notice—findings—reasoned decision—The termination of a father's parental rights was affirmed. Although respondent appealed the termination on lack of notice and assigned error to most of the findings, he did not cite any particular assignments of error in his brief. Those assignments of error are abandoned, the findings are conclusive, and the extent of the findings indicate a reasoned decision. **In re A.R.H.B. & C.C.H.L., 211.**

Subject matter jurisdiction—verified petition—The trial court had subject matter jurisdiction in a termination of parental rights case even though the verified petition failed to contain all of the information required by N.C.G.S. § 7B-1104, because: (1) the father asserted no prejudice arising from the alleged omissions, and none was found; and (2) the record as a whole disclosed the father had access to all of the information required by the statute, and the petition was substantially compliant on its face. **In re T.M.H., 451.**

Sufficiency of evidence—failure to alleviate conditions—There was sufficient evidence to terminate a mother's parental rights where the parents had engaged in a physical fight in a hospital hallway, with the mother holding the youngest child in her arms during the fight; as a result a care plan was implemented but not completed; the court found that the mother had failed to alleviate the conditions which led to the removal of the children; and the mother told a social worker that the father had tried to attack her and that she had tried to run him over with her car. **In re D.B., C.B., 556.**

Sufficiency of findings of fact—willfulness—The trial court erred in a termination of parental rights case by failing to make specific findings of fact or to state in its conclusions of law that the father's actions were willful, and the case is remanded to the trial court to make appropriate findings as to willfulness and, if appropriate, to articulate conclusions of law including grounds under N.C.G.S. § 7B-1111(a) forming the basis for termination. The trial court may, in its discretion, receive additional evidence on remand. **In re T.M.H., 451.**

Willfully leaving children in foster care—findings and conclusions—The trial court properly exercised its discretion in terminating respondent mother's parental rights upon findings and conclusions that respondent had willfully left her children in foster care without making reasonable progress to correct the conditions which led to their placement. **In re A.R.H.B. & C.C.H.L., 211.**

TRIALS

Motion for new trial—denial not abuse of discretion—The trial judge did not abuse his discretion by denying defendant's motion for a new trial based on errors raised previously in the opinion where it had been held that those were not errors or abuses of discretion. **Kimbrell v. Roberts, 68.**

Requested instruction not given—encompassed in another—The trial judge did not abuse his discretion by not submitting to the jury a requested

TRIALS—Continued

instruction where another issue which was submitted encompassed the substance of the requested instruction. **Kimbrell v. Roberts, 68.**

WITNESSES

Lay opinion—intoxication of another—A lay person may testify that a person is impaired, in his or her opinion, if that opinion is based on personal observation. The trial court did not err in a driving while impaired prosecution by allowing a deputy to testify that defendant was impaired where there was no dispute that the deputy personally observed defendant and that she based her opinion on those observations. **State v. Johnson, 673.**

WORKERS' COMPENSATION

Average weekly wage—employer-funded retirement accounts—An Industrial Commission conclusion in a workers' compensation case that employer-funded contributions to plaintiff's two retirement accounts should not be included in the calculation of plaintiff's average weekly wage was reversed and remanded. Not all fringe benefits are required to be excluded from an average weekly wage calculation; moreover, the Commission did not apply the proper analysis in determining whether the contributions at issue in this case should be excluded. **Shaw v. U.S. Airways, Inc., 474.**

Occupational disease—Lyme disease—failure to show employment placed at increased risk—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee did not prove that there was a causal relationship between her employment as a veterinary technician and her Lyme disease. **Kashino v. Carolina Veterinary Specialists Med. Servs., 418.**

Overpayment—credit denied—The Industrial Commission did not abuse its discretion by denying defendants a credit for amounts they had overpaid on a workers' compensation claim. The use of "may" in N.C.G.S. § 97-42 indicates that the decision to grant an employer a credit rests within the Commission's discretion. **Bennett v. Sheraton Grand, 250.**

Right to compensation—unilateral reduction—The Industrial Commission correctly concluded in a workers' compensation case that plaintiff's right to compensation arose under N.C.G.S. § 97-18(b) and constituted an award pursuant to N.C.G.S. § 97-87, and that defendants' unilateral reduction of plaintiff's compensation rate was contrary to N.C.G.S. § 97-47. **Bennett v. Sheraton Grand, 250.**

Sanction—Commission not notified—plaintiff's right to compensation accepted—The Industrial Commission did not abuse its discretion in a workers' compensation case in the amount of the sanction it imposed on defendants for not notifying the Commission that it was accepting plaintiff's right to compensation. The issue arose when defendants discovered that they had been overpaying plaintiff and unilaterally reduced the payments; the sole reason for the sanction accruing as it did was defendants' failure to comply with N.C.G.S. § 97-18 for approximately five years. **Bennett v. Sheraton Grand, 250.**

ZONING

Adjoining property owner—standing to appeal decision—property damage not alleged—Adjoining property owners must present evidence of a reduc-

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tion in their property values to establish standing to appeal a zoning officer's decision to the board of adjustment. Petitioner here did not do so. **Smith v. Forsyth Cty. Bd. of Adjust.**, 651.

Conditional use permit—standing—The question of whether the issuance of a conditional use permit was supported by the evidence was not considered where the plaintiffs lacked standing. **Casper v. Chatham Cty.**, 456.

Conditional use permit—standing—special damages required—The trial court correctly concluded that petitioners lacked standing to challenge a conditional use permit where they did not allege special damages distinct from the rest of the community. They alleged only that they own property abutting or near the property which is the subject matter of the permit. **Casper v. Chatham Cty.**, 456.

Contract zoning—failure to show contract or bilateral obligation—The trial court did not err in a declaratory judgment action by granting summary judgment in favor of defendants on the issue of contract zoning, because: (1) plaintiffs concede they did not present direct evidence of a specific bargain between defendant board of commissioners and defendant landowner for the use of the rezoned property; and (2) plaintiffs have failed to produce any evidence of a contract or bilateral obligation between defendants. **Childress v. Yadkin Cty.**, 30.

Factual findings—reasonableness of rezoning—Zoning boards do not have an absolute obligation to make appropriate factual findings which clearly demonstrate the reasonableness of a rezoning determination. **Childress v. Yadkin Cty.**, 30.

Illegal spot zoning—lumberyard—The trial court did not err by concluding that a rezoning to permit a lumberyard, a saw-mill, and related operations was illegal spot zoning, considering the size of the tract; the existing comprehensive zoning plan; the benefit and detriment to the owner, the neighbors, and the community; and the relationship of the purposed uses to current uses. **McDowell v. Randolph Cty.**, 17.

Outdoor advertising billboard—county ordinance preempted by State law—A county's zoning ordinance prohibiting the relocation of the pertinent billboard was preempted by State law regulating outdoor advertising. **Lamar OCI S. Corp. v. Stanly Cty. Zoning Bd. of Adjust.**, 44.

Radio tower—local ordinances—not preempted by federal aviation law—The trial court judge properly concluded that Rowan County's zoning ordinances are not preempted by federal aviation law in an action involving a conditional use permit for a radio broadcast tower. The Rowan County Board of Adjustment's decision was an exercise of precisely the type of local control over private use airports that the FAA specifically endorsed and encouraged. **Davidson Cty. Broadcasting, Inc. v. Rowan Cty. Bd. of Comm'rs**, 81.

Radio tower—safety hazard—whole record test—evidence sufficient—There was substantial evidence to support the Rowan County Board of Adjustment's decision that a radio broadcast tower would be a safety hazard to a private use airport, although petitioners presented evidence from which the opposite could be found, and the superior court correctly upheld the Board. **Davidson Cty. Broadcasting, Inc. v. Rowan Cty. Bd. of Comm'rs**, 81.

ZONING—Continued

Spot zoning—reasonable basis—change from rural agriculture to restricted residential—The rezoning of fifty-one acres of defendant's property from rural agriculture to restricted residential was not illegal spot zoning. Even if the board of commissioners engaged in spot zoning, it had a reasonable basis to do so based on the county's existing comprehensive plan to allow the development of residential subdivisions that are compatible to the rural parts of the county. **Childress v. Yadkin Cty., 30.**

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